



REPUBLIC OF KENYA

High Court of Kisii

Civil Suit 295 of 2010

EUNICE AUMA ODERA 1ST PLAINTIFF

PETER ODERO WADEYA 2ND PLAINTIFF

JAIRUS OGOLLA OWITI 3RD PLAINTIFF

EVANS MONDI ODHIAMBO 4TH PLAINTIFF

VERSUS

MIGORI TEACHERS CO-OPERATIVE SACCO SOCIETY LIMITED1ST DEFENDANT

THE STANDARD LIMITED 2ND DEFENDANT

HEADLINK PUBLISHERS LIMITED 3RD DEFENDANT

RULING

1. The application before the court is the Notice of Motion dated 28th March, 2011 brought under **Order 2 rule 15 (1) (a)** of the **Civil Procedure Rules 2010, Section 76** of the **Co-operative Societies Act (No.12 of 1997)** as amended by **Act No. 2 of 2004, Section 3A** of the **Civil Procedure Act Cap 21** and **ALL** other enabling provisions of the Law. The Applicant who is the 1st Defendant is seeking for **ORDERS:-**

- (a) *THAT the suit against the 1st Defendant herein be struck out with costs.*
- (b) *THAT the costs of the application be borne by the Plaintiffs/Respondents.*

2. The application is premised on the following grounds:-

- (a) *That the suit as against the 1st Defendant is speculative in nature and substance.*
- (b) *The suit is a total abuse of the judicial process.*

- (c) *It does not disclose a reasonable cause of action against 1st Defendant.*
- (d) *That this court has no jurisdiction to hear the suit between the plaintiffs and first defendant.*
- (e) *There is no common question of law that arises between the plaintiffs and the 1st Defendant over this suit.*

3. The Notice of Motion application is supported by the annexed affidavit of John Osewe, Chairman of the 1st Defendant/Applicant who depones that on the advice by their counsel, the allegations by the plaintiffs in the suit do not relate to the 1st Defendant in that they do not disclose how the 1st Defendant together with the 2nd and 3rd Defendants participated jointly and severally in defaming the plaintiff, the specific words uttered to defame the plaintiff are not disclosed and the plaint as drawn fails to connect the 1st Defendant to the substance of the case.

4. He further depones that the suit relates to acts done by the Commissioner for Co-operative Development and Marketing in exercise of his powers as expressly provided under the provisions of the **Co-operative Societies Act (No.12 of 1997)** as amended by Act No.2 of 2004. He further avers that on the 5th October 2009 the Commissioner for Co-operative Development ordered an enquiry to be conducted into the by-laws, Working and Financial Conditions of the 1st Defendant/Applicant and consequently appointed Mr. Frankinson Maera Co-operative Officer, Kajiado District and Mr. Simon Ireri, Co-operative Auditor Laikipia District to conduct the same. A copy of the inquiry order is annexed and marked **“JO 1”**. The inquiry report was prepared, compiled and read during the Annual General Meeting of the Members of the 1st Defendant/Applicant on the 8th November 2009 and the members unanimously adopted the recommendations therein. Annexed and shown to the court are copies of the inquiry reports minutes of the Annual General Meeting marked **JO 2 (a)** and **(b)**.

5. Consequently, the Commissioner for Co-operatives proceeded to issue the surcharge order showing the amounts each of the plaintiffs was to compensate the 1st Defendant. Shown to the court is a copy of the surcharge order which is marked **“JO-3”**.

6. The plaintiffs thereafter challenged the actions of the Commissioner by way of an appeal at the Co-operative Tribunal being Appeal No.7 of 2010. The said appeal is still pending. The Memorandum of Appeal is marked JO4. The Chairman of the 1st Defendant/Applicant further states that the plaintiffs filed the suit herein to oust the jurisdiction of the Co-operative Tribunal and that the dispute between the plaintiff and the 1st Defendant/Applicant is a co-operative dispute which must be channeled through the Co-operative Tribunal. The deponent also avers that the plaintiffs are guilty of material non-disclosure and that there is no common question of law that may arise between the plaintiffs and defendants jointly.

7. The deponent further states that following the removal of the plaintiffs/ respondents from office a new team was elected to run the affairs of the 1st defendant/applicant. Shown to the court and marked JO-5 is the certificate of search showing elected members.

8. It is also stated in the supporting affidavit that the plaintiffs after being removed from office challenged the said removal at the Co-operative Tribunal vide CTC No.56 of 2009. In its ruling, the tribunal upheld the decision of members at the general meeting of 2nd August 2009. A copy of the Tribunal's ruling is annexed and marked **“JO-6”**.

9. Finally the Chairman states that the Co-operative Societies (Act No.12 of 1997) and Act No.2 of 2004 do provide an elaborate procedure for challenging the actions of the Commissioner for Co-operative Development and that the said procedure has not been followed by the plaintiffs herein, thereby making this suit premature. He concludes by saying that the plaintiffs/respondents have mixed issues as against them and therefore the 1st Defendant/Applicant should be struck out of the suit with costs.

10. The application is opposed. Plaintiffs' advocates have filed Grounds of Opposition which are as

follows:-

- (i) *The application is defective in form and substance.*
- (ii) *The application is an abuse of court process aimed at prejudicing, embarrassing or delaying the fair trial of this action.*
- (iii) *The defence by 1st defendant raises triable issues.*
- (iv) *Affidavit by the 1st defendant/applicant is defective in substance as it is not confined to facts but contains only matters of legal arguments which form issues raised in the pleadings.*
- (v) *The application is defeated by dint of **Order 1 rules 9** of the CPR; and that the plaint accords with the provisions of **Order 1 rules 1 and 3** of the **Civil Procedure Rules**.*
- (vi) *Matters published all emanated from the 1st Defendant and were in writing before the same were printed by the other defendants.*

11. When the matter came up for hearing on the 24th October 2011, the Respondent/Plaintiff was represented by G.S. Okoth Advocate whereas Mr. Getange was present for the 1st Defendant/Applicant and also holding brief for Pandit for the 2nd Defendant. In his arguments, Mr. Getange stated that the suit by the plaintiff/respondent relates to defamation allegedly committed by 1st Defendant amongst others. He submitted that there is nothing in the plaint to show how the 1st Defendant defamed the plaintiff/respondent. The role of the 1st Defendant in the alleged defamation is not demonstrated save for paragraph 10 of the plaint which alleges that 1st Defendant conspired and at paragraph 15 that it influenced the Commissioner of Co-operative Development to compile a report.

12. He also submitted that the process complained of was a LEGAL PROCESS and he has relied on the annexures "JO1" and "JO2". In the reports the plaintiffs are surcharged by the Commissioner and the report was read to members and the same adopted reference is made on annexure "JO3". He has referred to **Section 58** of the **Co-operative Societies Act** which gives the Commissioner Powers to carry out an enquiry and **section 73** of the same **Act** which gives the Commissioner powers to surcharge. **Section 74** of the **Act** gives aggrieved parties right to appeal to the Co-operative Tribunal to challenge the report. He has referred the court to annexure "JO4" which is a memorandum of appeal by plaintiffs/respondents to the Co-operatives Tribunal. This he says has not been disclosed by the plaintiffs in the plaint.

13. The Tribunal already made a finding and found that the plaintiffs were liable for surcharge. He relied on the authorities filed in court on the 6th April 2011 and submits that this court has no jurisdiction to deal with this matter.

14. Finally he submits that **section 81** of the **Co-operatives Act** has not been complied with and that this court has only appellate jurisdiction. He has also referred to **section 74** of the **Co-operative Societies Act**.

15. In response, Mr. Okoth G.S. for the plaintiff/respondent submits that **section 3A** of the **Civil Procedure Act** is not applicable in this case. He submits that the application itself is defective in both form and substance as it purports to come under **Order 2 Rule 15 (2)** of the **Civil Procedure Rules** which forbids evidence. In this case the applicant has supported his case with an affidavit. He relies on the authority on his list.

16. He submits that the plaintiff is the one who decides who to sue and not to sue and he refers to **Order 1** of the **Civil Procedure Rules**, and that the defendant has no choice to decide whether or not to be sued. He also refers to **Order 1 rule 9** which forbids a suit being defeated by joinder or non-joinder of parties.

17. He concludes that the defendant filed a defence and having done so there are issues that can only be determined in the main suit. He prays that the application be dismissed.

18. I have now carefully considered the application dated the 28th March 2011; the supporting affidavit together with the annexures and the grounds of opposition together with the authorities duly filed and relied on by counsel for the 1st defendant/applicant and the plaintiff/

respondent. The law on striking out of pleadings was settled by the Court of Appeal in the case of **D.T. Dobie & Company Ltd. –vs- Muchina & another [1982] KLR** wherein the court stated:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no 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 the case before it.”

19. Having said that, I have noted that the Notice of Motion application is expressed to be brought under the inherent powers of the court. Counsel for the plaintiff/respondent has touched on this and stated that **section 3A** of the **Civil Procedure Act** does not apply in this case. I agree with him and state that rules of procedure are hand maids of justice, they are enacted to be complied with and unless they are followed, frivolity would not be avoided and the overriding objective of the law of practice and procedure under **section 1A** of the **Civil Procedure Act** may not be achieved. In my view the rules of procedure were enacted for orderliness and certainty in approaching the court and for that reason they must be followed as far as it is practically possible.

20. As regards the procedure followed by the Defendant in this case, I am afraid that neither the inherent powers of the court nor **section 1A** of the **Civil Procedure Act** gives the court the jurisdiction to grant the orders sought.

21. The inherent powers of the court cannot be invoked where there is a clear procedure provided for in the law or in rules. In Halsbury’s Laws of England, 5th Edition Vo. 11 2009 paragraph 5, it is observed:-

“... a claim should be dealt with in accordance with the rules of the court and not by exercising the courts inherent jurisdiction....”

And in Mulla on the Code of Civil Procedure Act V of 1908 15th

Edition at page 923 the learned author stated:-

“Inherent jurisdiction must be exercised subject to the rule that if the code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. Such provisions need not be express they may be implied or even implicit from the very nature of the provisions made for the contingencies to which they relate.”

22. In the case of **Muchiri –vs- Attorney General & 3 others [1991] KLR 516 at page 530** Bosire J. as he then was held:-

“Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored or where the invocation of the rules of procedure will work an injustice.”

23. It is obvious therefore that the power to strike out pleadings in our law is provided for under **Order 2** of the **Civil Procedure Rules** and for that reason, inherent powers of the court should not have been invoked in the application herein. It is my humble opinion that every procedure provided for by law comprises pertinent principles that apply when the court considers applications brought before it as

provided under those rules.

24. I am of the further view that the law should and will not allow a party to bring an application in total disregard of the express provisions of the law. The principal reason why the inherent power has been enacted in **section 3A** is to give the courts a residual power to correct an injustice which might result either by the absence of any procedure or by the application of the rules.

25. I have decided to consider the application under the law and procedure because the applicant has set out five (5) grounds upon which it has brought the motion under **Order 2 Rule 15 sub rule 2**. No evidence is admissible on an application brought under **sub rule 1 (a)** where the allegation is that the pleadings sought to be struck out disclose no reasonable cause of action. This is ground 3 of the application. Having sought to strike out their name from the plaint on this ground, it was not open for the applicant to rely on evidence as it did in this case, namely the supporting affidavit of one by the name of JOHN OSEWE. This makes the application fatally defective and on that ground alone susceptible to dismissal.

26. The power to strike out a pleading is a discretionary one. The same is to be exercised with the greatest care and caution. With this in mind I decline to grant the 1st defendant/applicant the prayers sought. Further this court has unlimited original jurisdiction in criminal and civil matters as is provided under **Article 165 (3) (a)** on the **Constitution of Kenya, 2010**. This case therefore needs to be heard and determined on the merits against all the defendants. Finally there are triable issues raised by the defence and the reply thereto dated 7th March 2011. All these issues need to be ventilated at the full hearing and not by summary procedure. For the above reasons, I dismiss the application with costs to the plaintiff/respondent.

27. Lastly, the delay in delivering this ruling is very much regretted. At the time it was due, I was engaged in other official duties.

Dated and delivered at Kisii this 4th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

M/s G.S. Okoth (absent) for Plaintiffs/Respondents

M/s Oigara Getange (absent) for 1st Defendants/Applicants

Mr. Oigara Getange (absent) for 2nd Defendants/Applicants

Mr. Oigara Getange (absent) for Defendants/Applicants

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.