



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
THIKA LAW COURTS
ELC.CASE NO.558 OF 2017

KIAMUMBI MULT-PURPOSE
CO-OPERATIVE SOCIETY LTD.....PLAINTIFF/RESPONDENT
-VERSUS-
JAMES MBURU KAMAU.....1ST DEFENDANT
PETER MURAGURI KAMAU.....2ND DEFENDANT/APPLICANT
GREEN COTTAGE ACADEMY....3RD DEFENDANT/APPLICANT
THE CHIEF LANDS REGISTRAR.....4TH DEFENDANT
THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The matter for determination is the 2nd & 3rd Defendants' *Preliminary Objection* dated 22nd February 2016, wherein they have urged the Court to strike out the instant suit on the following grounds:-

- 1. The Plaintiff's suit is incompetent and fatally defective as the Mandatory Statutory Notice to sue the Government was NOT served on the Attorney General who is the 5th Defendant and the 4th Defendant who are public servants prior to the filing of this suit which is mandatory under Section 13A of the Government Proceedings Act, Cap 40. Hence the Plaintiff's suit is incompetent and fatally defective and should be struck out with costs to all the Defendants.***
- 2. The Plaintiff is a legal person with limited liability hence it is mandatory for all the pleadings to be sealed with the Seal of Kiamumbi Multi-Purpose Co-operative Society Ltd. Hence the Verifying Affidavit sworn on 27th March 2015 and its Complaint dated 27th March 2015 are fatally defective and incompetent for lack of the mandatory Seal of Kiamumbi Multi-Purpose Co-operative Society Ltd. Hence this suit should be struck out with costs to the 2nd and 3rd Defendants and all Defendants by the Honourable Court.***
- 3. The 2nd Defendant avers that he is a past member No.387 of Kiamumbi Multi-Purpose Co-***

operative Society Ltd still owning 735 shares hence the Plaintiff is estopped by The Co-operative Societies Act, Cap 490 from suing him in a Civil suit in a dispute between a member and a past member concerning the business of his Co-operative Society, its Committee or any office of the Society. Hence this suit is incompetent and fatally defective and should be struck out with costs to the 2nd and 3rd Defendants by the Honourable Court.

4. The 3rd Defendant avers that 3rd Defendant's Mrs. Judy Muraguri is a Co-operative Director of Green Cottage Academy Ltd and she is also a member/shareholder No.718 of Kiamumbi Multi-Purpose Co-operative Society Ltd. Hence:-

a. The Plaintiff is estopped by The Co-operative Societies Act, Cap 490 from suing him in a Civil Suit in a dispute between a member or a past member concerning the business of his Co-operative Society. Hence this suit is incompetent and fatally defective and should be struck out with costs to the 2nd and 3rd Defendants by the Honourable Court.

b. She is entitled to freely use the public utility plot(s) hence the claim for Orders of Injunction is misconceived since a society member/shareholder and a Kiamumbi Resident cannot be a trespasser of his/her own public utility plot whatsoever.

5. There is a subsisting suit Nairobi HCCC ELC 243/2011 Peter Muraguri Kamau & Others...Vs...Kiamumbi Multi-Purpose Co-operative Society Ltd on the same issue where an order of inhibition was issued on 7th June 2011. This suit is pending for hearing and determination hence this new suit should be struck out for non-disclosure of this material fact.

The said **Preliminary Objection** is opposed by the Plaintiff herein through Grounds of Opposition filed on 14th April 2016. These grounds are:-

i. That the circumstances giving rise to the institution of the suit herein and the Notice of Motion application under a Certificate of Urgency filed contemporaneously thereto are such that strict adherence to Section 13A of the Government Proceedings Act would have caused injustice, hardship and infringement of the rights of the Plaintiff as is enshrined in the Constitution.

ii. That the said Section 13A of the Government Proceedings Act viewed in light of the circumstances herein is unconstitutional as was declared by the High Court in Kenya Bus Service Limited & Another...Vs...Minister for Transport & 2 Others, Civil Suit No.504 of 2008.

iii. That the Co-operative Society Act (Cap 490 Laws of Kenya) under which the Plaintiff is registered does not provide for mandatory sealing of pleading hence the affidavit sworn on 27th March 2015 and the Plaint dated 27th March 2015 are competent.

iv. That without prejudice to the above, the contentions of the 2nd and 3rd Defendants in their Preliminary Objection dated 22nd February 2016, amount to procedural technicalities which do not limit the Plaintiff's right to a fair trial pursuant to Article 159(2)(d).

v. That the dispute arising herein is not the type contemplated under Section 76 of the Co-operative Societies Act and as such this suit is properly filed in the court with jurisdiction as per statute and constitution.

vi. That further to the above, the Plaintiff lays claims against other parties who are not its members.

vii. That the Plaintiff is not aware of the alleged suit stated at paragraph 5 of the 2nd and 3rd Defendants Notice of Preliminary Objection herein and demands that the said court file be placed before the Honourable Judge herein.

This **Preliminary Objection** was canvassed by way of **written submissions** and in compliance thereto the **Law Firm of Gitau J. H. Mwara & Co. Advocates** for 2nd & 3rd Defendants filed their submissions on **31st October 2017**, and urged the Court to uphold the **Preliminary Objection** and dismiss the suit herein. They relied on **Section 13A** of the **Government Proceedings Act** which provides:

“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a Notice in writing has been served on the Government in relation to those proceedings”.

They also relied on the case of **Jacqueline Jebichi Ngetich....Vs...The Attorney General (2015) eKLR**, where the Court held that:-

“The Respondent has urged dismissal of the Appeal on the ground that no Statutory Notice was served on the Attorney General and on the case of Samson Lereya & 6 Others...Vs...Attorney General HCCC No.115 of 2006 KLR, where a three Judge bench dismissed the Plaintiff’s suit for failure to serve the Attorney General with the Statutory Notice within stipulated time of thirty (30) days..... I have no reason to come to a different finding. The claim was incompetent. The Statutory Notice was not served upon the Attorney General”.

Further, the 2nd and 3rd Defendants relied on **Section 76(1)(b)** of the **Co- operative Societies Act, Cap 490**, which provides that:-

“If any dispute concerning the business of a Co-operative Society arises;-

b. between members, past members or deceased members and the Society, its Committee or any office of the Society, it shall be referred to the Tribunal”

The Plaintiff on its part filed its **written submissions** on **9th November 2017**, through the **Law Firm of Njuguna, Kahari & Kiai Advocates** and urged the Court to dismiss the instant **Notice of Preliminary Objection**. They relied on the case of **Kenya Bus Service Ltd & Another...Vs... Minister for Transport & 2 Others (2012) eKLR**, where it was held that:-

“Section 13A of the Government Proceedings Act as a mandatory requirement for the institution of suit against the government violates the provisions of Article 48 of the Constitution”.

It also relied in the case of **Katelembo Athiani Muputi Farming and Ranching Co-operative Society & 6 Others....Vs....Joseph Muinde & 7 Others (2017) eKLR**, where the Court held that:-

“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”.

It further relied on the case of **Zachariah Okoth Obado...Vs...Edward Akong’o Oyugi & 2 Others (2014) eKLR**, where the Court held that:-

“Be that as it may, the essence of Article 159(2)(d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties”.

The Court has now carefully considered the instant **Notice of Preliminary Objection** and the submissions made thereon. The Court has also considered the pleadings in general, the cited authorities and the relevant provisions of law and the Court makes the following findings;

The Court will first determine whether what the 2nd & 3rd Defendants have raised has met the threshold of what constitute a **Preliminary Objection**. A **Preliminary Objection** was described in the case **Mukisa**

Biscuits Manufacturing Ltd...Vs...West End Distributors Ltd (1969) EA 696, to mean:

“A Preliminary Objection consists of a point of law which has been pleaded or which arise from a clear implication out of Pleadings and which if argued as a preliminary point may dispose of the suit...It cannot be raised if any facts have to be ascertained or if what is sought is an exercise of judicial discretion”.

It is trite that **Preliminary Objection** cannot be raised if any facts have to be ascertained. Further a **Preliminary Objection** is capable of bringing an end to a matter preliminarily as was held in the case of *Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999*, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Therefore it is evident that the effect of **Preliminary Objection** if upheld is to render any further proceedings before the court impossible.

The 2nd and 3rd Defendants have alleged that the suit herein is incompetent as the Plaintiff did not serve the **Statutory Notice** to the **Attorney General** as provided by **Section 13A of the Government Proceedings Act**. The said Objection raises a pure point of law and it stems from the proceedings. If upheld, it is capable of bringing the matter to an end and one does not need to ascertain any facts. Therefore the **Notice of Preliminary Objection** as raised by 2nd and 3rd Defendants meets the threshold of what amounts to **Preliminary Objection** as described in the *Mukisa Biscuits Case (supra)*.

The next issue for determination is whether the **Preliminary Objection** is merited.

The 2nd and 3rd Defendants have submitted that the Plaintiff’s suit is **incompetent** and **fatally defective** as the mandatory **Statutory Notice to sue the Government** was not served upon the **Attorney General** who is the 5th Defendant herein. The Plaintiff has explained that the circumstances that gave rise to the institution of this suit could not allow strict adherence to **Section 13A of the Government Proceedings Act** as it would cause **injustice, hardship** and **infringement of the rights** of the Plaintiff. Indeed the Court has seen the provision of *Section 13A of Cap 40 Laws of Kenya* and it provides that;- **‘No proceedings against the Government shall lie until after the expiry of 30 days after Notice in writing is served to the Government’**.

The Court has considered the nature of the case herein. It is a suit against five Defendants – 1st & 2nd Defendants are private individuals while 4th & 5th Defendants represents the Government, while 3rd Defendant is a Corporate person. The suit herein is based on trespass on the suit property by the 1st, 2nd & 3rd Defendants. The main cause of action is against the 1st, 2nd and 3rd Defendants herein. The 4th and 5th Defendants have been sued for allegedly placing a caution on the Plaintiff’s parcel of land. Basically, the orders sought herein are against the 1st – 3rd Defendants and therefore this Court finds that failure to serve the **Statutory Notice** on the **Government** and **Attorney General** as provided by **Section 13A of the Government Proceedings Act** is not fatal to this suit and has not rendered this suit incompetent because even if the claim against the 4th & 5th Defendants is struck out, this suit would still stand against the other three Defendants.

On **ground No.2** on the fact that the pleadings were not sealed with the **Seal of Kiamumbi Multi-purpose Co-operative Society Ltd**. The Plaintiff submitted that the **Co-operative Societies Act, Cap 490**, under which the Plaintiff is registered does not provide for mandatory sealing of pleadings and hence its affidavits are competent. The Court has considered the said grounds and noted that even if the said pleadings are not sealed with the Seal of the Plaintiff, that defect is curable by amendments. Further **Article 159(2)(d) of the Constitution** behoves the court to uphold substantive justice but not to decide

matters before it on mere technicalities and procedure. The 2nd and 3rd Defendants have urged the Court to dismiss the suit on this omission but the court is alive to the fact that striking out a suit is a very draconian act as it locks out a party from the seat of justice before advancing its case. The said action is resorted to in very hopeless cases which cannot be cured through amendments. See the case of **DT Dobie & Co. (K) Ltd...Vs...Joseph Mbaaria Muchina & Another (1980) eKLR**, where the Court held that:-

“No suit ought to be summarily dismissed unless it appears so hopeless 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”.

In this matter, the Court finds that any defect as alluded by the 2nd and 3rd Defendants can be cured by amendment and failure to have the pleadings sealed is not a sufficient reason to strike out the suit herein.

The 3rd ground is that the 2nd and 3rd Defendants are past members of the Plaintiff herein and the Plaintiff is estopped from filing a Civil suit against its members or past members as provided by **Section 76(1)(b) Cap 490**.

However, the Plaintiff submitted that this is not the suit contemplated under **Section 76 of the Co-operative Societies Act** and therefore this Court has jurisdiction. Indeed the Court has considered the cause of action herein and it is based on trespass and use to land. **Article 162 (2) (b) of the Constitution** clothes this court with jurisdiction to hear and determine matters related to **use** and **occupation** of and title to land. The said jurisdiction is not granted to any Tribunal and more so Co-operative Societies Tribunal. Further **Section 13(1) of the Environment and Land Court Act** clothes this court with jurisdiction to determine disputes in accordance to **Article 162(2)(b) of Constitution**. It is therefore this Court that has jurisdiction to hear and determine a matter relating to use, occupation and title to land and not the Tribunal as submitted by the 2nd and 3rd Defendants. The matter contemplated in **Section 76 of Cap 496** are not matters related to land.

Ground No.4 is answered by the findings in **ground No.3** above. However, the 3rd Defendant herein is Green Cottage Academy which is sued in that capacity and not **Mrs. Judy Muraguri** as alluded by the 2nd and 3rd Defendants herein. That ground cannot stand too.

Having now carefully considered the available evidence, the Court finds that the 2nd and 3rd Defendants' **Notice of Preliminary Objection** raises procedural technicalities which cannot be upheld at the expense of substantive justice which goes against the spirit of **Article 159(2)(d) of the Constitution**.

For the above reasons, the Court finds the instant **Notice of Preliminary Objection not merited**. Consequently, the said **Notice of Preliminary Objection** dated **22nd February 2016** raised by the 2nd and 3rd Defendants **is hereby dismissed entirely with costs to the Plaintiff**.

Let the **Notice of Motion** dated **27th March 2015** and **the suit herein be heard and decided on merit**.

It is so ordered.

Dated, Signed and Delivered at Thika this **20th** day of **April 2018**.

L. GACHERU

JUDGE

In the presence of

Mr. Mbugua holding brief for Mr. Kinyua for Plaintiff/Respondent

M/S Cheserek holding brief for M/S Gachuru for 1st Defendant

No appearance for 2nd & 3rd Defendants/Applicants

No appearance for 4th – 5th Defendants

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

20/4/2018