



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 37 OF 2016**

**JOHN KAMANGU**

(Suing on behalf of Ya Mumbi Farmers Co-operative Society).....**1<sup>ST</sup> PLAINTIFF**

**JACKSON MWANGI**.....**2<sup>ND</sup> PLAINTIFF**

**CHARLES NJUGE**.....**3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ANNAH NJERI KAMAU**.....**DEFENDANT**

**AND**

**REGISTRAR FOR LANDS**

**UASIN GISHU COUNTY**.....**1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL LAND COMMISSION**.....**2<sup>ND</sup> INTERESTED PARTY**

**RULING**

This is the ruling in respect a notice of a preliminary objection by the defendant dated 15<sup>th</sup> January 2018 on the grounds that the plaintiffs lack locus standi to sue on behalf of Yamumbi Farmers' Cooperative Society. This matter came up for hearing of the preliminary objection on 14<sup>th</sup> February 2018 when Counsel for the defendant argued the same.

**Defendant's Counsel's Submissions**

It was Counsel's submission that the plaintiffs do not have locus standi to sue on behalf of the Yamumbi Farmers' Cooperative Society pursuant to section 65 and 66 of the Cooperative Societies Act Cap 490. He submitted that the society's properties vest in the Liquidator upon liquidation and section 66 gives the Liquidator powers to sue or defend on behalf of the society.

Mr. Mathai submitted that pursuant to Legal Notice No. 5544 dated 2/9/94 Yamumbi Cooperative Society ceased to exist and to date it does not have elected officials. It was further Counsel's argument that the Commissioner of Cooperative Development vide gazette Notice No. 89 of 6/1/17 extended the terms of the liquidation and appointed one Ishmael Mengich as the Liquidator.

It was Counsel's submission that by the time the suit was instituted by the plaintiffs, there was already a Liquidator who by law is mandated to sue on behalf of the society. He further took issue with the description of the plaintiff in paragraph 1 of the plaint as officials of Yamumbi Farmers' society. He also stated that the same ought to have been filed at the Cooperative Tribunal and not the court.

Mr. Mathai submitted that the plaintiffs are not envisaged in the interpretation of a person as provided for under Article 260 of the Constitution and neither do they fall under Article 22 which deals with the infringement of the bill of rights. Counsel relied on the case of **Keekonyokie Farmers Cooperative Society Ltd v. Hon. Engineer Peter Mositet & 18 others; Nairobi ELC Suit No.936 of 2014** where Nyamweya J upheld the preliminary objection and found that the plaintiffs did not have locus standi. Counsel urged the court to uphold the preliminary objection with costs to the defendant.

**Plaintiff's Counsel's Submissions**

Counsel for the plaintiff opposed the preliminary objection and referred the court to the amended plaint dated 19/9/16 and filed on 22/9/16 which was filed pursuant to the leave granted by the court on 19/8/16

Mr. Maritim submitted that the preliminary objection is misplaced as it refers to a plaint that has since been amended and served upon the parties. He stated that the amendment was to the effect that the parties file the suit in their own capacity with the authority of the liquidator and therefore the suit is proper before the court. It was further his submission that the preliminary objection refers to issues of fact which should have been brought by way of an application.

Counsel submitted that it is well settled that preliminary objections should only deal with matters of law and not fact. He further stated that the plaintiff has set out the facts in the pleadings which can only be determined through a full trial of the suit.

Mr. Maritim argued that no demonstration of ownership has been pleaded and as such if the suit is dismissed at a preliminary stage then it would defeat the common good of the general public which the plaintiffs are seeking to protect. Counsel cited the Constitution of Kenya 2010 which he stated that expanded the rights of individuals to seek legal redress without hindrance. Counsel cited the case of **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others** to support his position that the preliminary objection by the 1<sup>st</sup> defendant does not hold any water and should therefore be dismissed with costs. He further submitted that the plaintiff is acting in public interest as provided for under article 22 of the Constitution.

### Analysis and Determination

I have looked at the pleadings together with the submissions of both Counsel in respect of the preliminary objection raised herein. Counsel for the 1<sup>st</sup> defendant has submitted that the plaintiff does not have locus standi to institute this suit on behalf of Yamumbi Farmers Society which ceased to exist vide a legal Notice No. 5544. He further stated that the law is very clear that it is only the liquidator that can sue or be sued on behalf of a company or society in liquidation as per section 65 and 66 (1) b of the Cooperative Societies Act Cap 490 which provides that:

*65. Where the registration of a co-operative society is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be liquidator or liquidators of that society (hereinafter referred to as the liquidator) and all the property of such society shall vest in the liquidator from the date upon which the order of cancellation takes effect.*

*66. The liquidator shall, subject to this Act, have the following powers—*

*b) to institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the society; amongst other powers.*

The court is guided by the principles which were laid down in respect of preliminary objections in the case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd, Civil Appeal no.9 of 1969**: where it was held that:-

*“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 has to be ascertained or if what is sought is an exercise of judicial discretion”.*

The issue for determination is as to whether the plaintiff has locus standi to file this suit and whether the preliminary objection raised by the 1<sup>st</sup> defendant has merit and fits within the threshold that only matters of law and not facts should be raised as preliminary objections.

The main issue in this preliminary objection is one revolving around locus standi. It is not disputed that the plaintiff is in liquidation pursuant to the legal notice No. 5544 dated 2/9/94. This is admitted by both parties. This essentially means that Yamumbi Farmers Cooperative Society ceased to exist upon the appointment of a Liquidator whose term was extended by the Commissioner of Cooperatives vide a gazette notice dated 6/1/17. This means that the society lost its legal personality to sue and as such past members can only sue through the Liquidator.

It is also clear that it is only the Liquidator who has the mandate to bring or defend suits on behalf of the society as per section 66 (1) b of the Cooperative Societies Act. Individuals can only be allowed to sue in their personal capacity by virtue of section 69 of the Act which provides that:

*69.(1) A person aggrieved by any order or decision of the Commissioner or the liquidator under section 66 or section 68, as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision.*

*(2) A person aggrieved by a decision of the Tribunal under subsection (1) may appeal to the High Court within thirty days of the decision.*

However this section applies to situations where the individual or individuals are aggrieved by the decision of the Commissioner or the Liquidator. An individual may also sue if he or she is aggrieved by the decision of the Tribunal and may appeal to the High Court within thirty days. This is distinguishable because in the current case, the plaintiff is neither aggrieved by the decision of the Commissioner nor the Liquidator. Further the plaintiff is not aggrieved by the decision of the Tribunal as no case had been filed in the Cooperative Tribunal.

The plaintiff amended the plaint with the leave of the court granted on 29<sup>th</sup> August 2016 to indicate that they were suing in their own capacity and also with the authority of the Liquidator. They are suing the 1<sup>st</sup> defendant whom they allege to have entered on the suit land

which had been earmarked for public use by Yamumbi Farmers' Cooperative Society. What is the effect of the amendment of the plaint to include the fact that the plaintiff is suing on their own behalf with the authority of the Liquidator. The amendment in my view does not change the status of the plaintiff. The Yamumbi Farmers Society is still in liquidation and a liquidator in place who has the mandate to file the case on their behalf.

The plaintiff alleged that they obtained authority from the liquidator to sue the defendant on behalf of Yamumbi Farmer's Society. What was so difficult for the Liquidator who is duly appointed to sue in this matter as he is the one who has the mandate to do so? Moreover the plaintiff did not annex a letter of authority from the Liquidator or was it verbal?

On the issue of whether the matter should have been filed in the Tribunal, I am of the view that this is purely a land matter where a party wants to assert rights which have allegedly been infringed by the defendant. It neither involves the management of the Cooperative society nor its operations. The submissions that the 2010 Constitution expanded the rights of individuals to legal redress is sound but the same must be done within the law and the context within which such redress is being sought. I find that the court has jurisdiction to determine the dispute as presented by the plaintiff but the main problem is the issue of locus standi as the plaintiff Society ceased to exist when a liquidator was appointed.

The case of **Keekonyokie Farmers Cooperative Society Ltd v. Hon. Engineer Peter Mositet & 18 others; Nairobi ELC Suit No.936 of 2014** cited by the Counsel for the 1<sup>st</sup> defendant is distinguishable as this case dealt with a scenario where the issues were decisively settled at the Cooperative Tribunal and a subsequent liquidation of the society. That an appeal was filed in the High Court but before it could be concluded the Commissioner of Cooperatives dissolved the society. What is important is the issue of locus which is similar to the current case. The society was under liquidation therefore it ceased to exist by virtue of it being deregistered. The court found that the party lost its capacity as a legal person to sue and be sued.

Having said that I find that the plaintiff has no capacity to sue on behalf of Yamumbi Farmer' Society in liquidation to assert rights that can be brought to court by the Liquidator. The upshot is that the preliminary objection dated 15<sup>th</sup> January 2018 is hereby upheld and the plaintiff's suit is hereby stuck out with costs to the 1<sup>st</sup> defendant.

**Dated and delivered at Eldoret this 21<sup>st</sup> day of June 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Mathai for the 1<sup>st</sup> defendant and in the absence of Mr. Maritim for Plaintiffs and Attorney General for 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Mr. Koech – Court Assistant.