



**REPUBLIC OF KENYA**

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

**ELC CAUSE NO. 370 OF 2017**

**FORMERLY KISII ELC NO. 601 OF 2016**

**ANGATA BARGOI FARMERS.....PLAINTIFF**

**-VERSUS-**

**DAVID KIPTANUI KORIR & 87 OTHERS.....DEFENDANTS**

**RULING**

By a Notice of Motion dated 31<sup>st</sup> January, 2018 which was brought under Order 7 Rule 13 of the Civil Procedure Rules and under Section 3 and 3A of the Civil Procedure Rules the Defendants/Applicants sought that the Plaintiff commencing the substantive Plaintiff be struck out and that the witness who testified in the matter be condemned to pay the costs of the suit.

The Application was based on the grounds that on 4<sup>th</sup> May, 1966 the Registrar of Cooperative Societies Registered an entity known as Ongata Barikoi Farmers Co-operative Society Limited and the same was consequently deregistered on 14<sup>th</sup> November, 1978 and hence that entity ceased to exist. The Applicant further contends that the Respondent/Plaintiff was on 28<sup>th</sup> May, 2001 issued with a title document in the name of Angata Baragoi Farmers Co-operative Society Limited and that the same does not exist in law. The application was also supported by the Affidavit of Jonathan Kiplangat Arap Bor the 89<sup>th</sup> Defendant which expounded on the grounds supporting the application and to his affidavit he annexed to the relevance of the instant application a certificate of registration dated 4<sup>th</sup> May, 1966 in the name of Ongata Barikoi Farmers Co-operative Society Limited and an order dated 14<sup>th</sup> November, 1978 for the dissolution of the aforesaid Ongata Barakoi Co-operative Society Limited and a letter dated 29<sup>th</sup> January, 2018 stating that the records of Commissioner of Co-operative does not show that Ongata Barakoi Farmers Co-operation Society is not registered and lastly a title deed in the name of Angata Baragoi Farmers Co-operative Society Limited that was issued on 28<sup>th</sup> May, 2001.

The application was opposed by John Ntucusoi who is Plaintiff/Respondent who filed a Replying Affidavit and is also the vice chairman of the plaintiff. He contends that the plaintiff herein and Ongata Barakoi Farmers Co-operative Society Limited are one and the same entity and that the mistake of spelling could be one of intonation and he has attached to the Replying Affidavit a document attesting to this position. He further averred that following its registration the plaintiff became the registered owner of LR No. Trans Mara/Moyoi/2 and they were issued with a title deed and that none of the defendants occupied any land during the registration and demarcation of the plaintiff's land.

The Respondent further contends that the plaintiff has been in existence since its registration and the issue of its dissolution came to its attention when the instant application was filed by the defendants/applicants and on follow up with the commissioner of Co-operative the Respondent contends that they were informed that the said liquidation order was neither gazetted nor implemented and he annexed a letter dated 27<sup>th</sup> February, 2018 and as a result the plaintiff is vibrant, existing and the same not liquidated.

When the application came up for hearing the parties agreed to dispose off by way of submission and both parties filed their respective submissions.

Counsel for the Applicant contends that the plaintiff does not exist as a legal entity and the respondents have not tendered evidence of its certificate of registration and as per the Commissioner of Lands the Ongata Barakoi Farmers Co-operation Society Limited stands dissolved and the same is not the same as Angata Baragoi Farmers Co-operative Society Limited.

The Applicants argue that non-existent entity cannot purport to sue and hence the suit ought to be dismissed.

The Applicants have on the above ground relied on the case of

***The fort Hall Bakery Supply Co. Ltd –Versus- Fredrick Muigai Wangoe (1959) EA 474 where it was held that “a non-existent person cannot sue and when a court is made aware of this the action cannot proceed”.***

The Applicants further relied on the provision of **Section 63 of the Co-operatives Act which in alia provides that a Co-operative Society ceases to exist from the date its registration is cancelled and further that non-existent entity cannot own property.**

Mr Bosek also argued that there is a distinction between cancellation and liquidation. He states that once the name is cancelled the entity ceases to exist where liquidation takes place or not.

The Respondent/Plaintiff in its submission contends that the entities Ongata Barakoi Farmers Co-operative Society and Angata Baragoi Farmers' Co-operative Society do mean and refer to the same entity and there is only a mistake in the spelling of the names.

The Respondent also argue that there are correspondences from the official of the correspondence from the office of the commissioner of Co-operative Society that though a liquidation order was made no liquidation was appointed to take over the assets of the plaintiff.

The respondent further contends that the striking of pleading can only be done at the clearance of cases and in the instant suit it is not clear whether the plaintiff has been liquidated and has ceased to exist.

I have read the application and the elaborate submissions which have been made by counsel for the parties and at this stage the issue for determination is whether the plaintiff herein exists as a legal entity capable of suing and owning property.

From the affidavit in support of the application and the reply in opposition to the application both the applicant and respondent have annexed letters from the commissioner of co-operative society where the applicant has annexed letters showing that the applicants registration was cancelled and a liquidation order made. However, the said letter fail short of stating whether a liquidator has been appointed to take the assets of the applicant over and liquidate the entire society.

On the other hand the respondents have obtained a letter from the same office of the Commissioner of Co-operative Society stating that even though the said Commissioner had ordered for the dissolution of the applicant the said exercise did not take place.

The above position to say the least is conflicting and it is my finding that this is an issue that can fully be determined at a full hearing. The regulator who is the Commissioner of Co-operative cannot conclusively determine the legal status of the applicant and it is my finding that in the absence of such clear and unequivocal terms as to whether the applicant is dissolved, liquidated and/or deregistered then the applicant still exists for all intent and purposes and it will thus be unfair to strike out the plaint herein on the basis of the conflicting letters from the commissioner of Co-operative.

In view of the above I therefore decline to strike out the plaint for the reasons explained above and find that the instant application does not meet the threshold of those cases that are so clear to warrant the court exercise its discretion to strike out the plaint.

The application is dismissed with costs and I direct that the suit proceed to full hearing.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **20<sup>th</sup>** day of **July, 2018**.

**Mohammed Noor Kullow**

**Judge**

**20/7/18**

In the presence of:

Ms. Chelule holding brief for Bosek for 8<sup>th</sup> Defendant/Applicant

Makau for 8<sup>th</sup> to 88<sup>th</sup> Defendant

Parties

CA:Chuma

**Mohammed Noor Kullow**

**Judge**

**20/7/18**