



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 74 OF 2017**

**WISEBORN INDUSTRIES (K) LTD.....PLAINTIFF**

**VERSUS**

**FORTUNE SACCO SOCIETY LTD.....DEFENDANT**

**RULING**

The issue that calls for my determination is whether this Court lacks the jurisdiction to handle this dispute by virtue of the provisions of the *Co-operative Societies Act*.

The plaintiff filed this suit on 9<sup>th</sup> May 2017 seeking the following orders as against the defendant:

***(a) A declaration that the defendant's statutory power of sale has not yet crystallized in the view of the plaintiff's insurance cover and shareholding with the defendant.***

***(b) An order of permanent injunction directed against the defendant, its agents, employees, servants and/or through whoever (sic) against selling, alienating and/or in whatever other way interfering with the plaintiff's title No. L.R BARAGWE/RAIMU/2366, 2389 and 3282.***

***(c) Costs of and incidental to this suit.***

***(d) Any other/such other further relief/order as this Honourable Court might deem fit/just to grant.***

The basis of plaintiff's claim is that its director **CEASAR NJAGI KUNGURU** is a shareholder of the defendant where he owns fifty shares since 31<sup>st</sup> July 2009 and also has a deposit account with the defendant where he earns dividend. The plaintiff has a loan facility with the defendant which it has been un-able to service following losses that it incurred when its stock was destroyed by Government agencies and on or about 7<sup>th</sup> March 2017, the defendant instructed a firm of Auctioneers to sell the plaintiff's properties comprised in titles No. BARAGWE/RAIMU/2366, 2389 and 3282 (the suit properties). It is the plaintiff's case that not only has the power of sale not crystallized but further, that it has now started making profit and is in a position to service the loan. That gave rise to this suit.

Simultaneously with the plaint, the plaintiff filed an application seeking injunctive relief to restrain the defendant, its agents, servants or employees from interfering with the suit properties pending the determination of this suit. That application is not the subject of this ruling.

On its part, the defendant pleaded in its defence that the plaintiff having failed to service the loan in terms of the charge document, it is entitled to exercise its statutory power of sale notwithstanding the fact that

the plaintiff is now making profits since the repayment of the loan was not pegged on the success or failure of the plaintiff's business. Most importantly, the defendant pleaded that it would raise a Preliminary Objection on this Court's jurisdiction to determine this suit since the plaintiff is a member of the defendant.

On 18<sup>th</sup> May 2017, the defendant filed a Notice of Preliminary Objection raising the following issues:

**1. That the suit and the application dated 9<sup>th</sup> May 2017 is incompetent and this Court lacks the jurisdiction under the Co-operative Societies Act.**

**2. That the suit and application dated 9<sup>th</sup> May 2017 should therefore be dismissed with costs to the defendant.**

By consent of counsel, the Preliminary Objection was canvassed by way of written submissions which have been filed both by **MR. KARIUKI** instructed by **WAMBUGU KARIUKI & ASSOCIATES** for the plaintiff and **MS WANJIRU** instructed by **WANJIRU WAMBUGU ADVOCATES** for the defendant.

I have considered the Preliminary Objection and the submissions by counsel.

As the Preliminary Objection touches on the issue of this Court's jurisdiction to determine this dispute, it is a matter that must be settled at this early opportunity because without jurisdiction, this Court must lay down its tools as was held in the case of **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX KENYA LTD 1989 K.L.R 1.**

It is the defendant's contention that the plaintiff is its member and therefore the dispute is governed by the provisions of **Section 76 of the Co-operative Societies Act. Section 76 (1) (2) of the Co-operative Societies Act** provides as follows:

**76 (1) "If any dispute concerning the business of a Co-operative Society arises:-**

**(a) among members, past members and persons claiming through members, past members and deceased members, or**

**(b) between members, past members or deceased members, and the society, its committee or any officer of the Society; or**

**(c) between the society and any other Co-operative Society; it shall be referred to the Tribunal**

**(2) A dispute for the purposes of this section shall include:**

**(a) a claim by a Co-operative Society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or**

**(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a Co-operative Society, whether such debt or demand is admitted or not.**

**(c) a claim by a Sacco Society against a refusal to grant or a revocation of license or any other due from the Authority" Emphasis added**

Although the plaintiff has pleaded in paragraph seven (7) of the plaint that its Director **CEASAR NJAGI KUNGURU** is a shareholder of the defendant since 31<sup>st</sup> July 2009, the defendant through its Chief

Executive officer **AMOS KIMOTHO NJERU** in a replying affidavit to the plaintiff's application for injunctive relief pending trial deponed in paragraph five (5) thereof that it is the plaintiff which holds shares of 200/= as a member of the defendant. A copy of the share statement for the period 6<sup>th</sup> May 2016 to 16<sup>th</sup> May 2017 was annexed to that affidavit which has not been rebutted. It is therefore clear that the plaintiff is a member of the defendant and this dispute is between a member and the Society as provided under **Section 76 (1) (b) of the Co-operative Societies Act** as cited above. It is also clear from the case of **GATANGA COFFEE GROWERS CO-OPERATIVE SOCIETY LTD VS GITAU 1970 E.A 561** that the term "***business of the Society***" is not to be defined in a restricted manner "***but covers every activity of the Society within the ambit of its by-laws and rules***". It is common knowledge that the main business of a Co-operative Society is to give loans to its members and the plaintiff concedes that it took a loan from the defendant which it was however un-able to service following the loss it incurred when its stock was destroyed. This matter is therefore well within the jurisdiction of the Tribunal established under ***Section 77 of the Co-operative Act***.

It is now well settled that where a statute has provided a forum to a party through which any grievances can be addressed, the Courts must be hesitant to assume jurisdiction and allow those other bodies the opportunity to handle such disputes as provided in the relevant statutes. Whereas the Constitution can confer or limit the Court's jurisdiction in particular cases, there are also other laws that can also do so and one such law is the ***Co-operative Societies Act Chapter 490 Laws of Kenya***. Indeed by allowing other bodies to exercise the jurisdiction conferred on them by statute, the Court will be up-holding ***Article 159 (2) (c) of the Constitution*** which requires the Court to promote other forms of dispute resolution. The ***Co-operative Societies Act*** is clear that a dispute of this nature "***shall be referred to the Tribunal***" and as was held by the Court of Appeal in the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY VS KARUME 2008 1 K.L.R 426**, where there is a specific procedure provided by law for addressing specific grievances, that procedure should be followed. In any case, there is no suggestion that ***Section 76 (1) of the Co-operative Societies Act*** which deprives this Court of the jurisdiction to handle a dispute such as this one is un-Constitutional, un-reasonable or leaves the plaintiff with no other remedy. After all, ***Section 81 of the Co-operative Societies Act*** provides a remedy of appeal to this Court from any order of the Tribunal.

I am persuaded therefore that the Preliminary Objection taken by the defendant with regard to this Court's jurisdiction is well founded and I up-hold it.

The up-shot of the above is that this suit is struck out with costs to the defendant.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> NOVEMBER, 2017**

Ruling delivered, dated and signed in open Court at Kerugoya this 24<sup>th</sup> day of November 2017

Mr. Kariuki for Plaintiff present

Ms Kiragu for Ms Wambugu for Defendant present.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> NOVEMBER, 2017**

MR. KARIUKI: I seek leave to appeal.

COURT: Leave is granted.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> NOVEMBER, 2017**