



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT KITALE  
LAND CASE NO. 131 OF 2017

PONDENI FARMER CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF

VERSUS

CHARLES MBERIA.....1<sup>ST</sup> DEFENDANT

JETHRO MWINZI.....2<sup>ND</sup> DEFENDANT

BAINITO AMBUDO HUSSEIN.....3<sup>RD</sup> DEFENDANT

PROTAS MUINDI.....4<sup>TH</sup> DEFENDANT

MR. OMONDI.....5<sup>TH</sup> DEFENDANT

**R U L I N G**

1. The defendants in this suit, who are represented by the Attorney General have filed a Notice of Preliminary Objection stating as follows:-

**(1) That the entire suit offends the mandatory provisions of Section 6 of the Surveyors' Act Cap 299 Laws of Kenya.**

**(2) That the suit and Notice of Motion offend the mandatory provisions of Section 12 of the Government Proceedings Act Cap 40 of the Laws of Kenya.**

**(3) That the plaintiff's suit and Notice of Motion further offend the mandatory provisions of Order 4 Rule 1(4) of the Civil Procedure Rules 2010.**

**(4) That the plaintiff's suit is Res Judicata in view of Kitale E&L Pet. No. 1 of 2009 – Podeni Farmers Co-operative Society Ltd & Others –vs- The Attorney General & Others.**

**(5) That the plaintiff's suit is incompetent, defective, misconceived frivolous and vexatious.**

2. They state that on the basis of the above the suit should be either dismissed or struck out with costs.

3. The plaintiff has responded to the notice of Preliminary Objection by filing a number of grounds. The plaintiff avers that the defendants haven't lodged any pleadings to warrant their invocation of the provisions of *Section 6 of the Survey Act Cap 299* and the provisions of *Section 12 of the Government*

**Proceedings Act Cap 40** respectively; that the defendants have not been sued in their private capacities or personal capacities, but that they have been sued in their “private capacities for invading the plaintiff’s land parcels;” that the plaintiff is a co-operative society with limited liability hence having capacity to sue and to be sued in its own names; that the current proceedings are not *res judicata* as alleged; and that in the absence of any response from the defendants the present application for dismissal or striking out is diversionary and is intended to mislead the court.

4. In their submissions filed on 19/10/2017 the defendants abandoned Ground No. 4 in their Notice of Preliminary Objection dated 2/8/2017. They also urged the rest of the grounds as one consolidated ground and submitted that there was one main issue, that is, whether the defendants were properly sued.

### **THE DEFENDANTS’ SUBMISSIONS**

5. The defendants urge that they are public servants employed under the Director of Surveys and that they have been sued in respect of actions undertaken in the course of their duty and therefore **Section 6 of the Survey Act Cap 299**, applies to shield them from personal liability for actions done in good faith and in the course of duty. They also aver that **Section 12 of the Government Proceedings Act Cap 40 of the Laws of Kenya** gives a guideline as to who should be made a party where the persons sought to be sued are public servants.

6. In a nutshell the defendants ask the court to find that this suit meets the definition of “*proceedings against the Government*” contained in **Section 4 of the Government Proceedings Act Cap 40 of the Laws of Kenya**.

7. The defendants submit that if by virtue of **Section 4 of the Government Proceedings Act** it is the Government which shall bear liability when the defendants are condemned, then these are proceedings against the Government. The defendants argue that **Section 6 and 12 of Cap 299 and Cap 40** respectively are couched in mandatory terms and non-compliance therewith is fatal to this suit.

8. The defendants cited the case of **John Muthoka Mutua & Others –vs- Joyce W. Kiombe & 3 Others 2017 eKLR** in support of their argument. The defendants aver that, the facts of that case are in *pari materia* with the facts of the instant suit in that the defendants herein have no direct interest in the land to entitle the plaintiff to sue them in their personal capacities.

9. There were no written submissions filed on behalf of the plaintiff. In effect there is no other document in response to the Preliminary Objection save the written response dated 29/9/2017 whose contents I had outlined herein before.

10. The issue that arises from the Preliminary Objection is whether this suit amounts to proceedings against the Government. In determining this issue the court has examined the pleading filed. The plaintiff has argued that since the defendants have not filed any response to the suit, they should not be heard to say that the court should invoke the Provisions of **Section 6 of Cap 299 and Section 12 of Cap 40**. In my view, I believe that the plaint and the documents filed alongside it may shed light as to whether these proceedings are proceedings against the Government.

11. To begin with, the plaint describes the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants as male adult working for gain at the Office of the Director of Surveys though the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are based in Nairobi and the 3<sup>rd</sup> defendant is designated as County Surveyor and is based in Trans-Nzoia County. The 2<sup>nd</sup> defendant is merely described as a “*male adult working for gain in Nairobi*”. However the Hon. The Attorney General has entered an appearance on behalf of all the five defendants and though not stated expressly the Notice of Preliminary Objection must be taken to cover all of them.

12. At paragraph 15 of the plaint, the plaintiff avers that the defendants are intent on demarcating the plaintiff’s land and thereafter allocate it to invaders and trespassers who are pretending to be bona fide members. In the plaintiff’s witness statement the witness Nathan Mutali Mmasi who describes himself as

the Chairman of the plaintiff society avers that on the 26<sup>th</sup> June, 2017 he formally lodged a complaint at the office of the “1<sup>st</sup> defendant, being the Director of Survey” against the activities of the defendants but there has been no “positive action” from the Director’s Office regarding his report.

13. The Notice of Motion dated 24/7/2017 which was filed together with the plaint, is supported by the affidavit of Nathan Mutali Mmasi. He reiterates at paragraph 15 that he lodged a complaint with the Director of Surveys and exhibits a letter dated 26/6/2017 as testimony. Part of the said letter reads as follows:-

**“We refer to the above subject and as agents of Pondeni Farmers Co-operative Society Ltd we wish to raise our clients concern that you have embarked on an assignment of demarcating our client (sic) land parcels situate in Kitale. We are informed that one Mr. Omondi has started going round our client’s farms making announcements that he wants to commence the survey.....**

**“.....The upshot of the matter is that if your office above named proceeds with the proposed exercise it will be against the law and his action may attract criminal investigation and trespass upon private property. However if you elect to ignore our clients warning; we shall be compelled to institute legal proceedings against him in his individual private capacity if the cause of action call for the same. This litigation will also such (sic) in your Department as a matter of public knowledge. A clandestine letter from fraudsters was addressed to the National Land Commission which triggered a letter to your office dated 22/2/2015 (see attachment). The said letter did not emanate from our client and at no time has there been authority vested in your office to survey the said land”.**

14. Having written as above in a demand letter that is part of the exhibits in the plaintiff’s supporting affidavit which is filed together with the plaint, the plaintiff nevertheless joined the defendants, who work under the Director of Surveys, the addressee of the letter dated 24/7/2017, as defendants, purportedly in their private capacities for trespass to their property.

15. In my view there is sufficient evidence on the record, and specifically from the plaintiff’s side to show that the defendants were acting, not in their personal capacities, but as agents of the Director of Surveys. No other conclusion can be drawn from the descriptions in paragraphs 1 – 5 of the plaint and the letter dated 24/7/2017. Besides the plaintiff has not demonstrated in any way what personal interest the defendants stand to gain from conducting a survey of thousands of acres. He has also not shown that they are doing it at their own expense. In this court’s view, it is unlikely that the defendants, being Government Officers, could conduct the survey exercise, Government Officers, for private gain. And even if they were to gain, somehow, their agency relationship with the Government, the only ground which grants them some footing in conducting the exercise, must be given greater weight in determining whether the Government would be held liable for their actions.

16. Having said so, the question now arises as to whether the defendants are shielded from personal liability by the Provisions of **Section 6 of Cap 299**. That Section states that neither the Director nor any officer appointed by virtue of **Subsection 1 of Section 3** shall be held personally liable to any action or other proceeding for or in respect of any at or matter done or omitted without negligence in good faith in the exercise or performance or in the purported exercises or performance of any powers duties or functions conferred by the Act or by any regulations made thereunder. The Section does not bar any proceedings commenced against the Office of the Director or other Office. What is barred in that Section in any proceeding against the officer in his private or personal capacity.

17. It is therefore necessary to examine whether **Section 2 Cap 40** applies to these proceedings. **Sub Section 1 of that Section** states that civil proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be. In **Section 201 Cap 40**, an officer is defined to include “any servant of the Government”. **Section 3 of Cap 40** states that civil proceedings by or against the Government or civil proceedings to which the Government is a party shall be construed to include a reference to civil proceedings in which the Attorney General or any Government Department or any

Officer of the Government, as such is a party. That Section refers the reader to **Part 1V of the Act**. In that part, a procedure for satisfaction of orders against, among others, an Officer of the Government is prescribed at **Section 21**. At **Section 21 (4)** it is provided that no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any decretal sums or costs and no person shall be individually liable under any order for the payment by the Government or any Government Department or any officer of the Government as such, of any money or costs.

18. The suit herein seeks not only general damages for trespass but also costs. A wholistic construction of the Provisions of the Government Act which I have cited hereinabove only leads to a conclusion that where the Provisions of **Section 12 of the Cap 40** are not observed, there would emanate practical difficulties in the process of execution of any orders issuing from the suit.

19. In conclusion I find that the defendants, ought not to have been made parties to the suit in their private capacities in view of the Provisions of **Section 12 of the Government Proceedings Act** and **Section 6 of the Surveys Act Cap 299**. The defendants are also protected from personal liability by the Provisions of **Section 6 of the Surveys Act**.

20. Consequently, I strike out the plaintiff's suit with costs.

Dated, signed and delivered at Kitale on this **13<sup>th</sup>** day of **November, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**13/11/2017**

Coram

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Bororio holding brief for the Plaintiff

N/A for the Defendants

**COURT**

Ruling read in open court in the presence of counsel for the plaintiff.

**MWANGI NJOROGE**

**JUDGE**

**13/11/2017**