



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 936 OF 2014

KEEKONYOKIE FARMERS CO-OP SOCIETY LTD..... PLAINTIFF

VERSUS

HON. ENG. PETER MOSITET.....1ST DEFENDANT

HON. MOSES OLE SAKUDA.....2ND DEFENDANT

HIRAM MWANGI KAHIRO.....3RD DEFENDANT

HON. GEORGE SUNGUYA.....4TH DEFENDANT

MOTONKA OLE NKOITIKO.....5TH DEFENDANT

TITUS LEMARON MURKUKU.....6TH DEFENDANT

JOHN YIAILE OLE LENKUNIU.....7TH DEFENDANT

KINTALEL OLE NTALIANI.....8TH DEFENDANT

SINTAMEI OLE MULELENGI.....9TH DEFENDANT

DANIEL KOILEL TINAI.....10TH DEFENDANT

KARAMA OLE OLOLODAPASH.....11TH DEFENDANT

STEPHEN MARANYA OLE KEREA.....12TH DEFENDANT

SAMUEL ITA OLE MANTINA.....13TH DEFENDANT

MUREMU OLE YIAILE.....14TH DEFENDANT

GEORGE RISA OLE SUNKUYIA.....15TH DEFENDANT

JOSEPH RIAS OLE SUNKUYIA.....16TH DEFENDANT

TIPATIT OLE NTIMERI.....17TH DEFENDANT

SAMSON KEREYA.....18TH DEFENDANT

HAMILTON LEKUKA PARSEINA.....19TH DEFENDANT

RULING

Introduction

The Plaintiff filed a the suit herein by way of a Plaint dated 14th July 2014 in which it was seeking a declaration that it is the proprietor of, and entitled to exclusive possession of the property known as KAJIADO/OLCHORO ONYORE/46 (hereinafter referred to as “the suit property”). It in addition sought a permanent injunction restraining the Defendants from dealing with the said property, and damages for trespass. The Plaintiff on the same date also filed a Notice of Motion, seeking a temporary injunction to restrain the Defendants from entering into, sub dividing, taking possession of, disposing, transferring and/or in any way howsoever dealing with the suit property. The grounds for the Notice of Motion were that the Plaintiff is the registered proprietor of the suit property and has been in occupation and use of the same, and that the Defendants have by way of an unlawful resolution made on the 5th June 2014 decided to appropriate, sub-divide and share out the suit premises without any basis in law or any justification.

The Preliminary Objections

The 1st to 4th Defendants subsequently filed a Notice of Preliminary Objection dated 23rd July 2014 on the grounds that the suit as filed and canvassed in the Plaintiff's Plaint and application is fatally and incurably defective in law, and as such cannot stand or be ventilated before this Court for reason that the alleged Plaintiff cooperative society ceased to exist in law or otherwise vide Gazette Notice No. 11916 dated 6th August 2013. Further, that the suit contravenes mandatory provisions of law and is an abuse of the process of this Court.

The 1st to 4th Defendants in a replying affidavit sworn by the 1st Defendant on 10th October 2014 stated that the issues in contention herein were decisively settled by the Co-operative Tribunal in **Tribunal Case Number 327 of 2007**, wherein the Tribunal held after evaluating all evidence that the suit property doesn't belong to Keekonyokie Farmers Co-Operative Society Limited and that the registration certificate of Keekonyokie Farmers Co-Operative Society Limited was irregularly obtained. Further, that further to the said decision of the Commissioner of Co-operatives cancelled the registration of the society known as Keekonyoike Farmers Co-Operative Society Limited and ordered that it be liquidated. The deponent annexed a copy of the Gazette notice cancelling registration of the said society.

The 5th to 19th Defendants also filed a Notice of Preliminary objection dated 23rd July 2014 seeking to have the Plaintiff's application and suit dismissed and/or struck out with costs on the grounds that the Plaintiff society was dissolved and incapable of instituting any action in court. In a replying affidavit sworn by the 12th Defendant on 23rd July 2014, it was also reiterated by the said Defendants that proceedings in **Cooperative Tribunal Case No. 327 of 2006** resulted in orders restraining the subdivision of the suit property, and that the said Tribunal made a finding that the Plaintiff's certificate of registration was irregularly obtained and ordered the Commissioner for Cooperative Development to conduct an inquiry to establish the members of the Keekonyokie Community who constitute the membership of the society

Further, that an appeal was subsequently filed against the said judgment of the Tribunal in **High Court Civil Appeal No. 110 of 2012**, but that before the court could determine the said appeal the Commissioner for Cooperative Development the Commissioner proceeded to dissolve the Plaintiff society as ordered by the Tribunal and appointed a liquidator by Gazette Notice No. 11916 of 16th August 2013. The 5th – 19th Defendants annexed the proceedings and judgment in in **Cooperative Tribunal Case No. 327 of 2006**, the petition of appeal in **High Court Civil Appeal No. 110 of 2012** and of Gazette Notice No. 11916 of 16th August 2013. The deponent further stated that the 5th -19th

Defendants also filed **Constitutional Petition 540 of 2013** to challenge the legality of the Commissioner's and Liquidators action to enter into a sale agreement with respect to the suit property, in which a conservatory order was issued. He annexed a copy of the said Petition.

The Submissions

Parties were directed to file written submissions on the Defendants' preliminary objections, and the 1st-4th Defendants' counsel in submissions dated 10th October 2014 outlined the facts that gave rise to this suit and preliminary objections, and referred the Court to section 12 of the Co-operatives Societies Act which states as follows:

“Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.

He also relied on section 63 of the same Act which provides that where the registration of a co-operative is cancelled, the society shall cease to exist as a corporate body from the date the order takes effect, and submitted that upon cancellation of the Plaintiff's registration, the Plaintiff ceased being an entity that has authority under the law to act as a single person distinct from its members or otherwise, and lost the essence of section 12 of the Co-operative Societies Act. He also relied on the following definition of a corporate body as stated in the Black's Law dictionary in this respect:

“An entity having authority under the law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely, a group or succession of person established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who made it up, exists indefinitely a part from them, and has the legal powers that its constitutional gives it”.

The counsel for the 1st- 4th Defendants also referred the Court to sections 63 and 65 of the Cooperative Societies Act on the consequences of putting a Cooperative Society into liquidation, and also relied on various judicial decisions for his submissions, including **Matinyani Women's Development Group vs Group Four Security Limited, HCCC No. 1043 of 1997**, **Lumumba Mumma & Kaluma Advocates vs Kenya Railways Corporation, HCCC No. 499 of 2010**, and **Kenton Kijabe Co-operative Society vs The Commissioner Of Co-operative Development and Five Others HCCC No. 63 of 2012**.

Lastly, the counsel submitted that the current suit and application amount to an abuse of the court process since the Plaintiff is pursuing the same remedies in parallel courts, and that the present court stands the risk of granting orders in conflict with the court hearing the appeal from the Co-operative Tribunal's decision.

The 5th-19th Defendants' counsel filed submissions dated 15th September 2014, and averred that the Plaintiff is a nonentity as it does not exist, and hence cannot institute a suit. Further, that on 16th August 2013 the Commissioner for Cooperative Development dissolved what was then known as Keekonyokie Farmers Cooperative Society Limited and appointed a Liquidator. The 5th – 19th Defendants submitted that the said Liquidator thereafter filed an application seeking the very same orders the Plaintiff is now seeking.

The Plaintiff's counsel in submissions dated 9th October 2014 on his part contended that to the extent that the Defendants have not filed any defence to the claim herein, their objection to the suit has no basis and the same cannot be sustained. He relied on Order 2 Rule 9 of the Civil Procedure Rules to argue that a party may by his pleadings raise a point of law, and that a notice of preliminary objection is not pleading and to the extent that it is not premised on a pleading it is unsustainable.

The Plaintiff further submitted that the Defendants have contended that the Plaintiff was dissolved by the

Commissioner of Co-operatives, and he relied on the provisions of section 61(1) of the Co-operatives Act to argue that the Defendants have to demonstrate in this respect that there was a process envisaged by statute that led to the dissolution of the Plaintiff. The said section provides as follows:

“If the commissioner after holding an inquiry under section 59 or making an inspection under Section 59 of this Act, or receiving an application made by at least three fourths of the members of co-operative, is of the opinion that the society ought to be dissolved, he may by writing order the dissolution of the society and subsequent of the registration”

Further, that the question of whether or not there was such a process can only be determined upon evaluation of evidence, and that a gazette notice is insufficient to demonstrate dissolution where such dissolution is contested. Consequently, that is not a determination that can be made on a preliminary objection as it invites evaluation of process and certain documents that demonstrate the position of the Plaintiff in law.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The Plaintiff has argued that the Defendants’ preliminary objections cannot be raised as they are not pleadings and are not premised on any pleadings filed by the Defendants. It is my view that technical objections can be raised and are indeed allowed under our Civil Procedure Rules independent of any other pleading. Order 2 Rule 14 of the Civil Procedure Rules provides that no technical objection may be raised to any pleading on the ground of any want of form. My interpretation of this rule is that technical objections can therefore be raised with regards to any pleading filed by a party, so long as the objection is not on the form of that pleading.

In addition the law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

The issues therefore to be decided in the present preliminary objections are firstly, whether the said preliminary objections raise pure points of law, and if so, whether they have merit and should be upheld. It is not disputed in this respect that the Plaintiff was registered under the Co-operative Societies Act as a cooperative society, and that the acting Commissioner for Co-operative Development on 6th August 2013 published a Gazette Notice No 11916 which contained a Liquidation Order with respect to the Plaintiff. More specifically, the said Liquidation Order stated as follows:

“WHEREAS I am of the opinion that Gikonyoike FCS Limited (CS/1721) should be dissolved pursuant to section 62(1) (b) and (c) of the said Act, I cancel the registration of the said society and order that it be liquidated.

Any member of the society may within thirty (30) days from the date of this Order appeal to Cabinet Secretary responsible for Co-operatives against the order.

And further, pursuant to section 65 of the said Act, I appoint Stanley W. Ongeli, Senior Assistant Commissioner for Co-operative Development P. O. Box 40811, Nairobi to be liquidator for a period of not exceeding one year and authorize him to take into his custody

all the properties of the said society including such books and documents as are deemed necessary for the completions of the liquidation.”

Given that the publication of the said gazette notice is not disputed, it is my view that the Defendants' preliminary objection is thus properly before this Court as they have raised a pure point of law as regard the legal effect of the said liquidation order on the Plaintiff. The Plaintiff is in this regard incorporated as a statutory corporation by virtue of section 12 of the Co-operatives Societies Act by virtue of its registration as a co-operative society. It is the said Act that is the Plaintiff's charter of corporation in terms of its rights, powers, duties, and obligations. It is also the said Act that provides for the Plaintiff's constitution and dissolution

The effect of the liquidation order issued on 6th August 2013 is in this respect to be found in sections 61, 62, 63 and 65 of the Act which provide as follows:

“61. Procedure for dissolution

(1) If the Commissioner, after holding an inquiry under section 58 or making an inspection under section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.

(2) Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, within two months after the making of such order, appeal against the order to the Minister with a final appeal to the High Court.

(3) Where no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Minister or by the High Court, as the case may be.

(4) Where the Commissioner makes an order under subsection (1) he shall make such further order as he thinks fit for the custody of the books and documents and the protection of the assets of the society.

(5) No co-operative society shall be dissolved or wound up save by an order of the Commissioner.

62. Cancellation of registration

(1) Where a co-operative society has—

(a) less than the prescribed number of members; or

(b) failed to file returns with the Commissioner for a period of three years; or

(c) failed to achieve its objects,

the Commissioner may, in writing, order the cancellation of its registration and dissolution of the society and the order shall take effect immediately.

(2) A person aggrieved by an order of the Commissioner under subsection (1) may appeal against such order to the Minister within thirty days of the order.

63. Effects of cancellation

Where the registration of a co-operative society is cancelled, the society shall cease to exist as a corporate body from the date the order takes effect.

65. Appointment of liquidator

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.”

The two legal effects found in the said provisions that are relevant to the capacity of the Plaintiff to bring the suit and application herein are that firstly, the Plaintiff has ceased to exist as a corporate body, and therefore lacks the privileges and attributes that attached to it as a corporate body under section 12 of the Co-operative Societies Act to hold movable and immovable property, enter into contracts, and/or to sue and be sued in its name. Secondly, all the property of the Plaintiff by virtue of section 65 of the Act now vests in the liquidator appointed pursuant to the liquidation order in the Gazette Notice No 11916 published on 6th August 2013, and the Plaintiff has no interests in, or capacity to deal with the same.

For the above reasons the Plaintiff's suit and application are therefore incompetently before this Court. This Court therefore finds that the Defendants preliminary objections dated 23rd July 2014 have merit, and are upheld. The Plaintiff's suit and application both dated 14th July 2014 are accordingly struck out, and the Plaintiff shall meet the costs of the said suit and application and of the Preliminary Objections by the Defendants dated 23rd July 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of ____December____, 2014.

P. NYAMWEYA

JUDGE