

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
MISC. LAND APPLICATION NO. 34 OF 2023**

THOMAS MAKONGOAPPLICANT

VERSUS

**KIGERA ETUMA VILLAGE COUNCIL 1ST RESPONDENT
DAUD SHAMA 2ND RESPONDENT
MZEE EKUNGU MINING CO-OPERATIVE SOCIETY LTD 3RD RESPONDENT
THE ATTORNEY GENERAL4TH RESPONDENT**

RULING

11th & 13th July, 2023

M. L. KOMBA, J;

This is a ruling on a preliminary objection raised by the counsel for respondents in regard to prayer for dispensation of mandatory requirement of 90 days statutory notice to sue the Government and temporary injunction to restrain the 1st, 2nd and 3rd respondents from using the disputed land pending determination of the matter.

Upon filling of the same, counsel for respondents raised preliminary Objection which pray to be heard on the date scheduled for hearing of Application that;

- 1. That the applicant sued a wrong party and an existing party hence the same to be dismissed with costs.*
- 2. That the application is bad in law for lack of procedural requirement.*
- 3. That the application is incompetent for contravening Regulation 83(2) of the Cooperative Societies Regulations of 2015.*

When the matter was scheduled for hearing, applicant stand solo unrepresented while 1st and 4th respondents were represented by Mr. Abdalah Makulo and Ms. Flora, both State Attorneys and 2nd and 3rd respondents were represented by Mr. Wambura Kisika, an advocate. As the tradition of the court that preliminary Objection should first be entertained as was in the case of **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal No. 86 of 2018, this court allowed counsel for the respondents to submit over the preliminary objection.

Mr. Makulo had a very short submission that regarding the Local Government Authority Act, of 1987, the act, the applicant sued the wrong party. He submitted that there is no Kigera Etuma village rather a Kigera Village as seen in the certificate of Registration. He adduced that in the application the applicant writes Kigera Etuma Village Council, there is no village with this name. He said under S. 26 (2) of the Act, when the village

is registered it becomes a body cooperate which can be sued or capable to issue. He maintained that the applicant sued a wrong party and prayed the matter to be dismissed with costs. He then pray to abandon the second point of objection.

Mr. Kisika on the other hand submitted that his objection is based in Regulation 83 (1) and (2) of the Cooperatives Societies Regulations of 2015 because the 3rd respondent is a registered cooperative society. Under the Cooperative Society Regulation, any disputes concerning cooperative society among its members or any other person must first be mediated amicably and if failed it must be referred to the Registrar of Cooperative Society. He said there is step which was not complied before this application is filed in court. To boost his argument he cited the case of **Daudi Gerald Kilinda vs. Chama cha Msingi Kalemela** Civil Appeal No. 5 of 2019 and **Posta na Simu SACCOS vs. Christopher Ernest Kowi** (PC) Civil Appeal No. 17 of 2022 Hon.

It was his submission that the applicant in this appeal was supposed to refer dispute to the society for settlement and then if not solved, refer the matter to Registrar. He said as long as the law has prescribed how to handle type of this cases then this court lacks jurisdiction and that if the

intention of the Parliament was the dispute to be solved in courts of law, then, the law could say it clearly. Lack of that it means the law wanted the dispute to be settle amicably in mediation. He prays the application to be dismissed with costs and the applicant to follow stipulated procedures.

Applicant (Mr. Makongo) was of the submission that Mr. Makulo failed to produces the Registration Certificate before the court which differentiate the names and if all there is such differences of names, he submitted that it is minor issue which can be rectified by Written Law Misc. Amendment No. 3 (Act No. 8 of 2018) as was cited in the case of **Chacha Isoye vs. Yohana Mwita Genda**, Land Appeal No 5. of 2022 where this court make interpretation of the above amendment that courts should do away with technicalities. In that case this court ordered amendment of the name and he prayed this court to allow amendment.

On the second point of objection Mr. Makongo submitted that the two cited cases by counsel provide interpretation of Regulation 83(1) which necessitated settlement as per schedule and that the provision talk about business but the application in hand does not concern business and he went further to interpret the word business to mean the activity of making money by producing or buying and selling goods or services. It was his

submission that as per his definition he has never made any business with Wazee Ekungu Mining Society, rather they simply invaded into his land and there was not business.

The applicant submitted that cases referred are distinguishable to the one at hand as in those cases parties were in business transaction but the current case has no business transactions. He said, words members and non-members to his interpretation is about those people who are coming in for business transaction and persons who are not in business transaction are not bound. He prayed the two points of objection should not be regarded and prays for an order of amendment for the 1st objection and dismiss the rest of objection.

During rejoinder Mr. Makulo submitted that the certificate of registration is in custody of village chairman who is in court. Mr. Wambura rejoin his submission that applicant relied on the Misc. Amendment No. 3 of 2018 but he did not explain what law was amended and rely on the decided case. It was his submission that overriding objective is applicable when the matter does not go to the root of the case, this court cannot go against the principle and entertain a suit for a wrong party basing on Overriding Objective principle. He further submitted that PO is based on Reg. 83(2)

and not 83(1) which provides that where the dispute under sub Reg. (1) is not amicably settled such dispute shall be referred to Registrar.

While clarifying the cited authorities he said in the case of **Daudi Gerald Kilinda vs. Chama cha Msingi Kalemela** (supra) hon. Judge said the dispute should be left to those who are competent. He submitted that if this is the dispute then it should go to the Registrar and resisted to interpret the law under narrow interpretation and he know it is the duty of judges/courts to interpret the law and insisted that the application is entitled to be struck out with costs.

I have thoroughly read the submissions by both parties and the pleadings from which the preliminary objection emanates. Thus, I am now ready to determine the two points of the preliminary objection starting with the second one. As I embark on that, let me state at the outset that it is now trite that, where a specific law establishes a special dispute resolution mechanism(s), all disputes arising from that law or emanating from relationships regulated by the said law, should not be entertained by ordinary courts unless the parties have exhausted the specific mechanism stipulated under the said law. Reference to such mechanisms is mandatory irrespective of the use of such words as "may" which in

ordinary cases implies optional (see **Salim O. Kabora vs. TANESCO & 2 Others**, Civil Appeal No. 55 of 2014, CAT at Dar es Salaam (unreported); **Azam Media Limited & 2 Others vs. TCRA & Another**, Misc. Civil Cause No. 56 of 2017, HC, Dar es Salaam (unreported) and **Smart Global Ltd vs. TCRA & Another**, Commercial Case No. 77 of 2009 (unreported); A suit filed in an ordinary court prior to exhaustion of the specific dispute resolution mechanism consequently bears the risk of being struck out for want of jurisdiction.

It is in this context, the counsel for the 2nd and 3rd respondents has passionately argued and submitted that the suit be found incompetent for want of jurisdiction as the applicant did not exhaust the specific remedy set out under regulation 83 of the Cooperative Societies Regulations. On his party, the applicant has contended that the dispute does not fall within the scope of Regulation 83(1) as he is not doing any business with the cooperative societies. Hence, the applicant cannot be penalized for failure to exhaust the remedy stipulated under the Regulations.

To appreciate these contending arguments, I will reproduce the provision of Regulation 83 (1) and (2). It states thus:

*(1) Any dispute concerning the business of a cooperative society between members of the society or persons claiming through them or between a member or **persons so claiming** and the Board or any officer, or between one cooperative society and another shall be settled amicably through negotiation or reconciliation.*

(2) Where the dispute under sub-regulation (1) is not amicably settled within thirty days pursuant to sub regulation (1), such dispute shall be referred to the Registrar for arbitration through Form No. 13 appearing under the first schedule to these regulations.

The wording of this provision is crystal clear that where there is any dispute concerning the business of the cooperative society and its members or persons so claiming the dispute has to be resolved amicably through negotiation. If the dispute is not amicably settled within thirty days then it has to be referred to the Registrar. The objection was based under sub regulation (2) to mean it has never been referred to the Registrar. But the dispute is referred to the registrar after when parties failed to settle amicably. If applicant confronted the 3rd respondent and failed, according to the law he was supposed to utilize sub regulation (2) by referring the same to the Registrar and not to this court. See **Viongozi Kisure SACCOS Ltd vs. Godwin Moses Mbise**, (PC) Civil Appeal No. 18 of 2020

(unreported) and **Posta na Simu SACCOS vs. Christopher Ernest Kowi** (supra).

In **Nazir Ahmad vs. Kings Emperor** (1936) PC at 253 ALL ER [1936] where it was held that, if a statute requires a thing to be done in a particular manner, then it should be done in that manner alone or not at all. Therefore, since the Cooperative Societies Act and the Regulations have provided specific ways of resolving disputes, the parties cannot create their own procedure. From this analysis I find the second objection to be meritorious.

The first objection is about suing non existing party. The Law under S. 26 stipulate when the village is registered it becomes a body cooperate and can be capable to sue or being sued. Applicant prayed this court to invoke Overriding Objective as presented under section 3 A of the Civil Procedure Code, Cap 33 (Cap 33) and allow applicants to make amendment, this argument came as a second option after doubting if names are different. A party who knows his involvement to the case warn on proper citation of his name, I find the counsel for 1st and 4th respondent is prudent bearing in mind as the consequence of suing wrong party, the decree will end up to

be a furniture as it cannot be executed. I agree with the counsel that there is certificate which bear a correct name and that the 1st respondent is not capable of being sued.

Overriding objective is applicable when the matter does not go to the root of the case. Let it noted that, introduction of the "Overriding Objective" under Section 3 A (1) and (2) of the Civil Procedure Code, Cap 33 which was enacted through section 6 of the Written Laws (Miscellaneous Amendments) (Act No. 8 of 2018) ought the courts to rely on substantive justice in making decisions instead of dwelling on technicalities instead they should determine cases justly. However, the principle applies only where the issue does not go to the root of the case.

In the matter at hand, the applicant's argument does not hold water, as the court cannot act blindly where the provisions of the law clearly stipulate the procedures to be complied with. In some of its decisions the Court of Appeal declared this legal position in respect of the extent in which the rule of overriding objective can be invoked, that it should not apply blindly in disregard of the rules of procedure coached in mandatory terms. See **Mondorosi Village Council & 2 Others vs. Tanzania Breweries limited** & 4 Others, Civil Appeal No. 66 of 2017 CAT at Arusha

(unreported) and **Sgs Societe Generale De Surveillance Sa & Another vs. Vip Engineering & Marketing Ltd & Another**, Civil Appeal No. 124 of 2017 CAT at Dar es Salaam.

For the aforesaid reasons I am convinced and find the Preliminary Objection meritorious, that the application is defective for suing non existing party and for non-complying with mandatory legal procedures, hence I struck out with costs.




M. L. KOMBA

Judge

13 July, 2023