



**Ndungu (As administrator of the Estate of the Late Peter Kanari Kabati) v  
Kiamumbi Farmers Co-operative Society Limited & another (Environment and Land  
Appeal 32 of 2020) [2023] KEELC 20044 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20044 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 32 OF 2020  
LN MBUGUA, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**MARGARET WANJIRU NDUNGU (AS ADMINISTRATOR OF THE ESTATE  
OF THE LATE PETER KANARI KABATI) ..... APPELLANT**

**AND**

**KIAMUMBI FARMERS CO-OPERATIVE SOCIETY LIMITED .... 1<sup>ST</sup>  
RESPONDENT**

**KIAMUMBI MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED .... 2<sup>ND</sup>  
RESPONDENT**

*(Being an Appeal from the judgment and Decree of the Hon.Chairman and  
Members of the Co-operative Tribunal delivered on 27th September 2016)*

**JUDGMENT**

1. The Appellant herein filed a statement of claim in the case no 304/2015 before the Co-operative tribunal on 21.5.2015 contending that her husband, the late Peter Kanari Kabati was a member of the respondents vide membership no 399. That her husband was allocated four plots by the respondents, but one plot namely 693-B was never handed over to him. After his death, the claimant pursued the claim where she was informed by the respondents that plot 693B was on the wayleave. She therefore sought allotment of another plot or compensation in lieu of that allotment.
2. The Respondents filed their joint statement of defense on 12.10.2015, where they contended that the claimant had irregularly balloted for a fourth plot but nonetheless the said plot was given to her as compensation for plot no 693B which was on the wayleave.
3. Vide a judgment delivered by the tribunal on 27.9.2016, the claimant's case was dismissed triggering this appeal.



4. The appeal was filed by way of a Memorandum of Appeal on 26.10.2016, where the grounds raised therein are summarized as follows.
  - i. The Learned Chairman and members of the Tribunal erred in law and in fact when they failed to appreciate that the Respondents had indeed failed to compensate the appellant with a clear plot of land.
  - ii. The learned Chairman and members of the Tribunal erred in law and in fact in finding that the Appellant had not qualified to ballot for a 3<sup>rd</sup> plot.
  - iii. The Learned Chairman and Members of the Tribunal erred in fact and in Law in finding that the Appellant's 3<sup>rd</sup> Plot was in compensation for the 2<sup>nd</sup> Plot that fell on a way leave.
5. The appellant therefore seeks orders that the appeal be allowed, by way of allowing her prayers in the statement of claim.
6. This case was heard by way of written submissions. The appellant relied on her submissions dated 4.6.2020 where she avers that in the minutes of 30.3.2012, the position of the chairman of the respondent was plainly stated, whereby the appellant was directed on how to regularize her position, of which she complied.
7. The appellant relied on the case of *Titus Muiruri Ndoge v Kenya Cannery Limited* [1988] eKLR. HCCC no 1832 of 1980 where it was held as follows:

“It is a principle of justice and equity. It comes to this, that when a man by his words or conduct has led another to believe that he may safely act on the faith of them and the other does act on them he will not be allowed to go back on what he has said or done when it would be unjust to inequitable for him to do so.”
8. The case of *Kenindia Assurance Company Limited v New Nyanza Wholesalers Limited* HCCA no 30 of 2015 [2017] eKLR was also proffered where the court quoted Halsbury Laws of England as follows:

“Common law estoppel by representation arises where a person has by words or conduct made to another a clear and unequivocal representation of fact either with knowledge of its falsehood or with the intention that it should be acted upon or has conducted himself that another would as a reasonable person understand that a certain representation was intended to be acted upon and the other person has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the person who made the representation..”
9. To this end, the court was urged to find that the minutes of the respondents are the only reliable evidence on the status of the disputed plots.
10. The submissions of the respondents are dated 14.7.2020. They highlighted the minutes of 6.6.2002 which captured the processes of balloting. They argued that Peter Kanari, the deceased only had 147.5 shares as at 21.12.2002, hence he did not meet the necessary threshold for balloting.
11. It was further argued that the court has not been told as to how the tribunal acted in violation of the laid down law. Thus this suit should be dismissed.



## Determination

12. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same.
13. It was held in the case of *Selle v Associated Motor Boat Co.* [1986] EA 123 as follows:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
14. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, on the duty of first appellate court, the court stated that;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
15. I have considered the entire, Record of Appeal as well as the written submissions proffered by the respective parties. The issue for consideration is whether the tribunal erred in failing to find that the appellant was entitled to the 3<sup>rd</sup> plot or compensation thereof independently of the 4<sup>th</sup> plot.
16. The case of the appellant before the tribunal was advanced by two witnesses, the Appellant (CW1) and her son Michael Muchiri Kanari (CW2). The claimant (CW1) had stated before the tribunal that her husband was a member of the respondent’s society where he had four plots. After her husband’s death, she obtained letters of administration and she proceeded to inquire about her husband’s interests with the respondent.
17. She met the Chairman who confirmed that indeed there were four plots, but the husband had apparently not completed paying for the shares. She was asked to pay ksh 5,000 for change of names and ksh 14,000 to complete payment of the shares. She further stated that her husband had paid ksh 3,000 for issuance of title for plot 693B. She was however never informed that the plot was on a way leave.
18. In cross examination she averred that she met the chairman and the committee members of the respondent when the minutes of 30.3.2012 were read out to her.
19. CW2, Michel Muchiri Kanari identified the claimant as his mother. He confirmed having accompanied his mother to the meeting of 30.3.2012, and that was the first time they went to follow up on the issue of his father’s property. That is also when the respondents mentioned the issue of the wayleave on one of the plots and they also said that they would get the fourth plot, even as the issue of the third plot was being resolved. They were also told to finish paying what his father had not paid.
20. In cross examination, CW2 reiterated that they completed the payment for the shares thereby getting 735 shares from 149½, thus his father became a fully paid member. They were never informed that they did not qualify to be entitled to the plot.



21. The case of the respondents was advanced by one Leonard Ndungu Mbugua (RW1), the chairman of the 1<sup>st</sup> respondent. He gave an account of how the society started as a coffee farming society with 740 acres of coffee plantation way before the 1980s. They subsequently sold their land in four phases, such that in the final analysis, each member was entitled to four plots. For the 1<sup>st</sup> and 2<sup>nd</sup> phases, each member was to get plots of 1/4 of an acre, while for phase 3 and 4, the plots were measuring 1/8 of an acre.
22. He averred that Peter Kanari Kahati had died in year 2011 and when the claimants came to their officers, they were requested to complete paying for shares but they never did. However, in good faith, the respondents advised the claimant to top up so as to fully benefit. That the idea was not to qualify for the fourth plot, but to benefit the member come other benefits.
23. RW1 further stated that they had established that the member in question had sneaked in a balloting for the fourth phase, yet he was not supposed to get such a ballot. He added that balloting was done in year 2002 and up to year 2012 the deceased had not come for the processing of the fourth plot. By then, (year 2012), processing of the fourth plots had long been concluded in year 2004. However, since the claimant qualified for the 3<sup>rd</sup> plot but it fell on a way leave, they were given the fourth plot.
24. In cross examination the said witness stated that as per the minutes of 30.3.2012, the claimants were requested to pay so as to qualify for the 3<sup>rd</sup> and 4<sup>th</sup> plots. He confirmed that the claimants went ahead and paid. For the plot where the claimants had paid a sum of ksh 3,000 it was not receipted because the plot fell on a way leave.
25. From the foregoing evidence, I find that there is no controversy that one Peter Kanari was a member of the respondent society. The relationship of the claimant to the deceased is also not in dispute. Further, there appears to be consensus that a member of the respondent was entitled to four plots.
26. It has also emerged that by the time the claimant met the respondents in year 2012 to inquire about the plots of Peter Kanari, the latter had not completed paying his shares which stood at 147½ instead of 735 shares. It has also emerged that plot 693B was found to belong to the deceased Peter Kanari but the same fell on a way leave.
27. In the evidence tendered by Michael Muchiri the son of the appellant before the tribunal, he indicated that they had been given the 4<sup>th</sup> plot. That evidence was in tandem with the statement of claim where the plot in issue is just one, plot no 693-B.
28. At this juncture, I pose the question as to; whether the claimant was disqualified from getting the 3<sup>rd</sup> plot (693-B), and whether the 4<sup>th</sup> plot was a compensation for the 3<sup>rd</sup> plot.
29. A perusal of the documents availed before the tribunal indicates that the respondents used to deal with various issues through minutes. This can be discerned from the Record of Appeal minutes of 30.3.2012 at page 41, minutes of 23.3.2002 at page 47, minutes of 11.12.2002 at page 62 and minutes of 5.4.2012 at page 68.
30. In light of the foregoing it follows that the decisions and communications made by the respondents to their members have to be discerned from the resolutions as captured in the minutes.
31. In his evidence before the tribunal RW1 had stated as follows:

“Peter Kamau Kahati was our member. He passed on in 2011. In 2012 the family visited us and we addressed the succession, the shares.. required top up. For the 3<sup>rd</sup> and 4<sup>th</sup> phase a condition was set so that all members become equal as the whole shamba was being shared



out. The deceased and the other members were urged to complete paying for shares. They never did.”

32. The minutes of 30.3.2012 at minute no 3 read as follows:

“ 3. M/N – 399 Peter Kanari Kabiti (deceased) represented by:

Michael Muchiri Kanari ID no 14xxxxxx (son)

Martin Muchai Kanari (Son)

Margret Wanjiru Kanari (wife of the late member) accompanied by  
Peter Kanari Kabati (Cousin)

They wanted to know the position of their late father’s estate in Kiamumbi. The committee noted that their P/N 693B falls under a way leave which needs replacement and it was agreed that a surveyor should go to the ground to conduct a survey on two plots adjacent to their plot to create a plot for that matter. It was also noted that the late member had not completed the membership as he had 149 ½ shares instead of 735 full shares of which they should top up ksh 11,700 so as to qualify to get other plots (i.e 3<sup>rd</sup> and 4<sup>th</sup> plots).”

33. The minutes of 5.4.2012 at minute no 3 in respect of member no 399 Margret Wanjiru Ndungu were recorded as follows:

“The member raised her shares by paying ksh 11,700 for 585 shares @ 20/= to make full share of 735 shares as per receipt no 18434 dated 5/4/2012. The membership shares were adjusted accordingly.”

34. What resonates from the above analysis is that it is the respondent who urged the claimant to regularize and finalize the payments, and that such payments were to enable the claimant to fully qualify for 3<sup>rd</sup> & 4<sup>th</sup> plots, and that the payments were fully paid 5.4.2012. Another issue to be discerned is that the claimant was to be compensated for plot 693-B which was on a way leave. RW1 never disowned the aforementioned minutes. Thus his claim that the claimant never paid was unfounded.

35. It follow that there is no evidence to indicate that the claimant was ever disqualified from regularizing her position as a member of the respondent. Further, there is not the slightest evidence to indicate that the respondents ever resolved that plot 693-B was being compensated with the 4<sup>th</sup> plot.

36. As right of submitted by the Appellant, the Respondents are estopped from renegeing on their resolutions in relation to the claim of the appellant.

37. In *Samson S. Maitai & another v African Safari Club Limited & Another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

38. In the case at hand, I find that the appellant had proved her claim of entitlement to the 3<sup>rd</sup> plot. Thus the Tribunal erred in dismissing her claim.



39. The court has considered that with the passage of time, the chances of there being an available plot may be slim. But again, the parties have not addressed this court on the question of quantum of compensation. The court will apply its own discretion in giving an award, which I now peg at ksh 1,500,000.

**Final Orders;**

40. In the final analysis, I hereby allow the appeal in the following terms;

- i. The Judgment delivered on 27.9.2016 before the Tribunal in the case 305/2015 is hereby set aside.
- ii. The Respondents are directed to compensate the appellant for plot no 693B with another plot measuring 1/8 of an acre from any part of the respondents' land. In the alternative the respondents should compensate the appellant in monetary terms to the tune of ksh 1,500,000.
- iii. As to costs, I find that the appellant still remains a member of the respondents, as such, each party shall bear their own costs before the tribunal and before this court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Njuguna for Appellant

Court Assistant: Eddel

