



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 75 OF 2021

MATHEW MUTUKU MULI.....1ST PLAINTIFF
AARON MUSEMBI MBATHA.....2ND PLAINTIFF
PETER KIMEU NGWATU.....3RD PLAINTIFF
GABRIEL KAVOSA MAEMBE.....4TH PLAINTIFF
P. MAINGI MUTUA.....5TH PLAINTIFF
MAURICE JOSEPH MUINDI.....6TH PLAINTIFF

VERSUS

PETER WANJOHI KIAMA, OFFICIAL LIQUIDATOR DRUMVALE FARMERS
COOPERATIVE SOCIETY LIMITED.....1ST DEFENDANT
THE COMMISSIONER OF COOPERATIVES.....2ND DEFENDANT
INTEX CONSTRUCTION LIMITED.....3RD DEFENDANT
SHAMIT SINGH VARMA.....4TH DEFENDANT
BENJAMIN KAKUTI KISILU.....5TH DEFENDANT
DANIEL WASYA MUSUVA.....6TH DEFENDANT
DOROTHY WAENI KAKUTI.....7TH DEFENDANT
GLADYS MWENDE WASYA.....8TH DEFENDANT
JOHN NDUNGU WARIUA.....9TH DEFENDANT
CHRISTOPHER KIMAMO MUCHIRI.....10TH DEFENDANT
LYON BUILDERS LIMITED.....11TH DEFENDANT
FREDRICK PHILIP MUEMA.....12TH DEFENDANT
STELLA NTHENYA NZAU.....13TH DEFENDANT

MILKAH MWAMISI.....14TH DEFENDANT

CHIEF REGISTRAR OF LANDS.....15TH DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Preliminary Objection dated the 30th August, 2021, where he contends that this Court lacks jurisdiction to handle this matter as it is a dispute involving members of a Cooperative Society. The Notice of Preliminary Objection was opposed by the Plaintiffs and canvassed by way of written submissions.

The 1st Defendant in his submissions states that by virtue of section 76 (1) and 77 of the Cooperative Societies Act, this matter should be handled by the Cooperative Tribunal as it is a dispute involving members. He insists the High Court only has an Appellate jurisdiction over disputes arising from members and officials (including liquidator) of Cooperative Societies since the primary jurisdiction lies at the Cooperative Tribunal. To support his argument, he relied on the decision of **Bingwa Sacco Society Limited V Quickline Auctioneers & Another (2017) eKLR**.

The Plaintiffs in their submissions insist this Court has jurisdiction to deal with the dispute herein as it involves cancellation of titles to land, rectification as well as mesne profits. Further, the interlocutory application seeks grant of inhibition orders and under section 68 of the Land Registration Act the Court described therein, means this Court. To support their averments, they relied on the following decisions: **Freizer Mumo V Jonah Kavithi Daniel & Magdalene Wayua Daniel (Sued as the representatives of the Estate of Daniel Mulwa Kavithi & 3 Others (2020) eKLR**.

Section 76 of the Co-operative Societies Act provides that:

'(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 purpose 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.'

From a perusal of the Plaint, it is evident that Drumvale Cooperative Society Limited has been in liquidation for over eleven years. I note the 1st Defendant is a Liquidator of Drumvale Cooperative Society while the 3rd to 14th Defendants are not members of Drumvale Cooperative Society Limited. Further, some of the suit lands in dispute have already been transferred to the 3rd to 14th Defendants. In the Plaint, the Plaintiffs seek various orders including a permanent injunction restraining the Defendants from interfering with the suit land, rendering of true record of accounts of the proceeds of Sale of part of the suit land as well as declaration that the transfers of various parcels of land to some of the Defendants be rendered null and void.

Except for filing the Notice of Preliminary Objection, the 1st Defendant did not file a Defence to controvert the Plaintiffs' averments. Further, the 2nd to 14th Defendants are yet to file any pleadings to oppose the instant suit.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that

'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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'

See also the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014, the Supreme Court**.

While in the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that: ***-"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."***

Further in the case of **Freizer Mumo V Jonah Kavithi Daniel & Magdalene Wayua Daniel (Sued as the representatives of the Estate of Daniel Mulwa Kavithi & 3 Others (2020) eKLR** the Court stated that:

'17. The jurisdiction of the Tribunal under Section 76(1) of the Co-operative Tribunal Act is confined to matters pertaining to the "business of a Co-operative Society" and not a dispute on ownership of land, be it between members of the Society or otherwise. Indeed, the issue of which court has the jurisdiction to determine disputes concerning the use, occupation and title to land have been exhaustively captured in the Constitution (Article 162(2) (b)) and the Environment and Land Court Act. In addition, the Land Registration Act provides the manner in which a Title Deed may be cancelled, and by which court. 18. Section 80 of the Land Registration Act provides that the court may order the rectification of the register by directing that any registration be canceled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or

mistake. Section 2 of the Act has defined a court to mean “the Environment and Land Court and other courts having jurisdiction on matters relating to land, which in this case, are the Magistrates gazetted to deal with land matters”.¹⁹ The Co-operative Tribunal is not one of the courts that is mandated to deal with land matters. Indeed, its jurisdiction is limited to deal with the disputes relating to the business of the Co-operative Society. The jurisdiction of the Tribunal under the Co-operative Societies Act does not involve resolving the issue of ownership of land, and cancellation of titles which have been allegedly fraudulently obtained or registered. It is only the Environment and Land Court and the Magistrate’s Court that have the jurisdiction to handle such disputes. ²⁰ However, if the dispute is in relation to any other business of the Society, like the bona fide officials; shareholding of the members, the payable dividends, the genuine register, amongst others, then the Tribunal will have exclusive original jurisdiction to deal with such issues. However, the moment the question of who owns or occupies a particular parcel of land arises, then the Tribunal ceases to have jurisdiction to deal with such a dispute. Indeed, the Co-operative Tribunal does not have jurisdiction to make a declaration on the bona fide owner of a particular parcel of land.’

See also the decision of **Kennedy Kimani Ndarwa V Methi & Swami Farmers’ Cooperative Society Limited & Another (2016) eKLR.**

In the current scenario, insofar as the Plaintiffs are members of Drumvale Cooperative Society Limited, I note the fulcrum of the dispute herein revolves around recovery of land and recovery of proceeds from sale of land. From the court records, none of the Defendants have filed any Defence to deny the Plaintiffs’ averments. Further, the 1st Defendant does not have a Defence to anchor his Preliminary Objection. It is my considered view that the prayers sought in the Plaint require evidentiary proof and are not restricted to the ambit of the Cooperative Tribunal as they also touch on cancellation/rectification of title. Further, from a keen reading of section 76 of the Cooperative Societies Act, I opine that the provisions therein deal with disputes on other businesses within the cooperative society but not claim for land.

Based on the facts as presented while associating myself with the decisions cited above, I find that there are no pleadings filed to provide a basis for the Preliminary Objection, which also requires the court to ascertain facts before the same can be determined. Further, at this juncture I also find the Notice of Preliminary Objection premature as this is not what was envisaged under section 76 of the Cooperative Societies Act. I opine that this suit should be set down for hearing and determined on its merits.

Further, by dint of section 13 of the Environment and Land Court Act, I find this court is seized with jurisdiction to determine the issues raised herein.

In the circumstance, I find the Notice of Preliminary objection dated the 30th August, 2021 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

JUDGE