



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 192 of 2008

MUTISO ISAIAH MUTYAUUVYU.....PLAINTIFF

VERSUS

1. PETER NDUE MUTISO

2. GEORGE MUTISO NDONGA

3. LUKENYA RANCHING & FARMING CO-OPERATIVE SOCIETY LTDDEFENDANTS

R U L I N G

1. The Defendants have raised, by **notice of motion dated 21st April 2010**, a preliminary objection on a point of law to the Plaintiff's suit. That point of law is that this court lacks jurisdiction to determine the suit in view of **section 76(1)** of the **Co-operative Societies Act, No. 12 of 1997** which provides-

“76. (1) If any dispute concerning the business of any 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. It was submitted for the Defendants that the 3rd Defendant is a registered co-operative society under the Co-operative Societies Act aforesaid. It was further submitted that the 1st and 2nd Defendants' interest in the suit properties and the Plaintiff's claims in the same were derived through deceased members of the 3rd Defendant. The suit properties are attached upon shares of the deceased members of the 3rd Defendant. It is the Defendants' case therefore that the Plaintiff should have filed his claim before the **Co-operative Societies Tribunal**, and that this court therefore has no jurisdiction to hear and determine this case.

3. For the Plaintiff it was submitted that the preliminary objection is misplaced in that the 1st and 2nd Defendants are not members of the 3rd Defendant notwithstanding that they claim through their deceased parents who were members; that fraud is involved in this case; and that title deeds for the suit properties have been issued, and that therefore the properties are private and the Co-operative Societies Tribunal cannot have jurisdiction over them.

4. I have considered those rival submissions. No authorities were cited.
5. The Plaintiff has pleaded in his **amended plaint dated 21st October 2009** (the original plaint was dated 4th November 2008) that he and the 1st and 2nd Defendants are brothers; that the suit properties were derived from shares owned and held by their two parents in the 3rd Defendant; that their parents directed while they were alive that the two suit properties should be shared equally between the three brothers (the Plaintiff and the 1st and 2nd Defendants); and that instead, the 1st and 2nd Defendants, in collusion with the 3rd Defendant, fraudulently had the two suit properties registered in the sole names of the 1st and 2nd Defendants. The Plaintiff therefore seeks declarations that the 1st and 2nd Defendants hold the respective suit properties in trust for themselves and him in equal shares, and also orders that the two properties be divided equally between the three of them.
6. In their defence the Defendants have pleaded that the deceased parents of the three brothers also had other shares in the 3rd Defendant through which other properties were allocated to the Plaintiff, and that each brother was given his rightful share of their parents' properties.
7. The pleadings disclose clearly that the suit properties were derived directly from the shareholding in the 3rd Defendant of the parents of the three brothers. The allocation of various parcels of land to the members of the 3rd Defendant, or to past or deceased members, was part of the business of the 3rd Defendant. A determination of the issues raised in the present suit must of necessity involve intimately an examination of that business of the 3rd Defendant. Were the shares of the deceased parents of the Plaintiff and the 1st and 2nd Defendants (and the benefits accruing from those shares, that is, the parcels of land allocated on account of those shares) properly allocated to the 1st and 2nd Defendants to the exclusion of the Plaintiff?
8. In my considered view, that will be a function of the Co-operative Societies Tribunal established under the Co-operative Societies Act.
9. I therefore hold that this court has no jurisdiction to hear and determine this suit which should have been filed before the aforesaid Tribunal.
10. In the circumstances, I must uphold the preliminary objection. This suit is hereby struck out with costs to the Defendant. It is so ordered.
11. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 16TH DAY OF AUGUST 2012

H.P.G. WAWERU

JUDGE

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY
OF SEPTEMBER 2012**

ASIKE-MAKHANDIA

.....
JUDGE