



REPUBLIC OF KENYA



Kibiri & 5 others v Harambee Savings & Credit Co-operative Society Ltd (Environment & Land Case 4 of 2021) [2022] KEELC 3595 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 4 OF 2021
LN GACHERU, J
JULY 21, 2022**

BETWEEN

**JOSEPH KARANJA KIBIRI 1ST PLAINTIFF
JOSEPH WAINANA 2ND PLAINTIFF
JOYCE MUTHUURI 3RD PLAINTIFF
JOHN NYAGA 4TH PLAINTIFF
EPHANTUS GITHIITHI 5TH PLAINTIFF
WILLIAM WAIGANJO 6TH PLAINTIFF**

AND

**HARAMBEE SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LTD DEFENDANT**

RULING

1. The plaintiffs are members of Harambee Savings & Credit Co-operative Society Ltd, Murang'a, branch, while the Defendant/Objector is a Society registered under the *Co-operative Societies Act*.
2. Through a plaint dated October 16, 2020, the plaintiffs brought this suit against the Defendant seeking for orders that:
 - a) A permanent injunction be issued restraining the Defendant by themselves, servants, agents, or employees from trespassing, occupying, living, staying, alienating, selling, transferring, or interfering in anyway with the Plaintiffs' quiet possession, use, occupation, development, and proprietorship of their respective portions of the suit property.
 - b) A mandatory injunction be issued directing the Defendant to order subdivision of Murang'a block 3/239, for purposes of processing titles in the Plaintiffs' names.



- c) Upon compliance with prayer (b) above, an order to issue directing the Defendant to execute transfer documents with respect to their respective shares of the plaintiffs within the suit property for purposes of issuance of titles in the plaintiffs' names.
 - d) In the event of non-compliance with prayer(c) above, this Court do direct the Deputy Registrar of this Court to execute all the instruments and or documents that will be necessary for the purposes of effecting the transfer of the respective portions of the suit property to the Plaintiffs.
 - e) A mandatory injunction be issued directing the Defendant to put the Plaintiffs into their respective portions of the suit property,
 - f) Costs of the suit and interest on the above.
3. The Plaintiffs averred that in 1990, the Defendant initiated a Housing Project, wherein it was to construct houses at affordable prices to benefit its members. That the Commissioner of Lands through a letter dated 7th December 1990, allocated the Defendant's Murang'a branch Land Parcel No. Murang'a Block 3/239 (the suit property). That in 1992, the Defendant cancelled the Housing Project and instead opted to sell vacant land to its members at a subsidized rate.
 4. The Plaintiffs further stated that in 1998, the Defendant conducted a ballot exercise, where some of its members including the Plaintiffs were allocated plots within the suit property. The Plaintiffs stated that they paid the amount of Kshs.22,000/= for the parcels of land, and therefore became bona fide purchasers of their respective portions of land within the suit property.
 5. The Plaintiffs further stated that the Defendant submitted a proposal of the sub-division to the Ministry of Lands. However, that the Defendant later directed the Director of Survey to cancel all resultant subdivisions of the suit property on the allegations that the same was not sanctioned by the Defendant's headquarters. That the said cancellation of the subdivision by the Defendant was a breach of contract.
 6. The Defendant opposed the suit through his Statement of Defence and Preliminary Objection both dated 16th April 2021. It averred that this Court has no jurisdiction to entertain the dispute at hand for the reasons that the matter complained of, fall within the jurisdiction of the Cooperative Tribunal.
 7. The Defendant further stated that the subdivision and transactions referred to by the Plaintiffs were conducted by its Murang'a Branch, without having the transactions sanctioned by the Defendant's Headquarters and therefore the transactions are now void to that extent. That the payments made by the Plaintiffs were paid to the Murang'a branch without the involvement of the Defendant.
 8. The defendant in their notice of preliminary objection sought for dismissal of the suit on the grounds that the court lacked the requisite jurisdiction to entertain the suit by virtue of the provisions of section 76(1) of the Cooperative Societies Act, which stipulates that a dispute of this nature shall in the first instance be filed and heard by the Cooperative Tribunal established under section 76 of the Act. The defendant declined to admit the jurisdiction of the court and prayed that the suit be dismissed with costs to the defendant.
 9. The court directed the parties to canvass the instant preliminary objection by way of written submissions and in compliance thereof, the Law Firm of Kinyua, Mwaniki & Wainaina for the Plaintiffs filed their written submissions on 23rd March 2022, in opposition to the preliminary objection. They relied on the following authorities:
 - a) Section 76 of the Cooperative Societies Act which relates to disputes. It states:



- (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 licence or any other due, from the Authority.

10. Further, article 162(2)(b) of *the Constitution* of Kenya which provides for the creation of the Environment and Land Court and which states:

- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
 - (a) -----
 - (b) the environment and the use and occupation of, and title to, land.

11. Again, section 13 of the *Environment and Land Court Act*, which provides for jurisdiction of the Environment & Land Court and states as follows -:

- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources.

12. In support of the abovementioned legislations, the plaintiffs relied on the case of *Dennis Mudbune & Anor VS Felgona Ndeda* (2019) Eklr, wherein the court held that the tribunal ought not to have made a determination which was in vain, as the said declaration cannot give to the respondent the title to the land in question.



13. The plaintiffs further relied on the case of *Donald eKLR, Kamwinzi Muteti v Mali Ya Mungu Muteti & another* [2020] which relied on the holding delivered in the case of *Ol Kalaou West Farmers' Co-operative Societies Ltd v David Kibue Kinyanjui* (2019) Eklr, where it was held:-

“The issue of whether the Co-operative Tribunal has jurisdiction to settle disputes amongst members of a Cooperative, or between members and a Cooperative is now settled, Indeed, this Court associates itself with the findings of the Court.

It continued.

The provisions of section 76 of the Cooperative Societies Act do not contemplate the tribunal to determine the ownership of land even if the dispute is between members, present, past, deceased and even if it was, the same has been superseded by the enactment of article 162(2)(b) of *the Constitution* and the creation of the Environment & Land Court. Thus this court has jurisdiction to entertain this matter and the preliminary objection is dismissed.”

14. The plaintiffs further relied on the case of *Frezier Mumo v Jonah Daniel & Magdalene Daniel (sued as representatives of the estate of Daniel Kavithi and 3 others)* [2020] eKLR in which the court held as follows:

“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.”

15. The defendant in turn filed their written submissions on April 8, 2022, in support of the preliminary objection through the Law Firm of Oraro & Company Advocates. They relied on the following provisions of the law: -

- a) Article 162(2)(b) of *the Constitution*, which establishes the Environment and Land Court.
- b) Section 13(2) of the *Environment and Land Court Act* which provides the jurisdiction of this Court.
- c) Section 77 of the Cooperative Societies Act which establishes the Co-operative Tribunal.
- d) Section 76(1) & (2) of the Cooperative Societies Act which provides for settlement of disputes.

16. The defendant further relied on the case of *Adero Adero & another v Ulinzi Sacco Society* [2002] eKLR, where the Court held that: -

“I agree with the submissions made on behalf of the respondent that as the subject matter of the suit was a dispute between a registered Co-operative Society and its members, the dispute should not have been filed in the High Court by dint of the provision of section 76 of the Co operative Societies Act, 1997. The forum with jurisdiction was the Co-operative Tribunal.

Further that:-



The High Court has no jurisdiction to entertain a dispute between a Society and its members concerning the business of the society... my view is that jurisdiction either exists or does not ab initio"

17. Further the defendant relied on the case of *Gatanga Coffee Growers Co-operative Society Ltd v Gitau* [1970] E.A. 361 wherein the Court held that the business of the Society means the internal management of the Society. That the business of the Society covers every activity of the Society within the ambit of its by-laws and rules.
18. The defendant also relied on the case of the *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR wherein it was held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.
19. In conclusion, the defendant submitted that the preliminary objection is merited and that the dispute in the suit herein fell within the jurisdiction of the Co-operative Tribunal, by dint of the meaning of "business of the society". They prayed that the suit be dismissed.

Analysis & Determination

20. The preliminary objection seeks to oust the jurisdiction of this court on the basis that this court lacks the jurisdiction to hear and determine the suit herein, which relates to land ownership between Members of a Co-operative Society and the Sale of land between members (and non-members) of the Society.
21. In order to arrive at an informed and just decision, the Court finds the following as salient issues.
 - a) Whether the preliminary objection dated April 16, 2021, by the defendant meets the fundamental threshold of a Preliminary objection?
 - b. Whether this honorable court has jurisdiction over the subject matter properties taking that it is alleged part of it is the co-operative society's property.
22. A preliminary objection was well established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, where the Court held as follows:

"So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

The court further held:

"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 to unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop"
23. For a preliminary objection to succeed, the same must raise pure points of law that it would not be difficult to ascertain and there must be no proper contests of facts. The purpose of preliminary



objection was well stated by the Supreme Court in Civil Application No. 36 of 2014:- *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR in which it was held:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection - against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

24. It is trite law that a preliminary objection can be brought at any time before the final conclusion of the case. Ideally, all facts remaining constant, a preliminary objection should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. This court therefore affirms that the filed preliminary objection, by the defendant herein is sound. (See *Zipporah Njoki Kangara v Rock and Pure Limited & 3 others* [2021] eKLR).
25. The second issue is whether this court has jurisdiction to determine this suit or whether it ought to be determined by the Co-operative Tribunal. Jurisdiction means the courts power to decide case and or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of article 162(2)(b). The Courts are vested with original and unlimited jurisdiction over land matters. From the preamble of the *Environment and Land Court Act*, the jurisdiction of the court is defined as “.....a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”
26. Under sections 4 and 13 (1) of the *Environment Land Court Act*, this court has the legal mandate to hear any matter related to environment and land, including the one filed by the plaintiffs hereof. (See the case of *Karisa Chengo VS Law Society of Kenya* [2014] eKLR).
27. In the case of “*Owners of Motor Vessel “Lilian S” v Caltex Oil [Kenya] Limited* [1989] IKLR, the court held as follows on jurisdiction: -

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction, which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.
27. From the facts of the case, the issue for determination before this court refers to land owned by the defendant, which land was to be subdivided and sold to the Plaintiffs, who had entered into various agreements for the sale of the said parcels of land. The defendant thereafter halted and reversed the sub-divisions and allocation of the said parcels of land on the grounds that its Headquarters had not sanctioned the sale.
28. From the above analysis, this matter involves agreements for the sale of land, the ownership of land, and the subdivision and allocation of the said land between members of a Co-operative Society and the Society. Indeed, some of the Plaintiffs have completed paying to the Society the stated purchase price for their parcels of land. This court finds and holds therefore that this places the cause of action



squarely in the jurisdiction of the Environment and Land Act and consequently this court finds that it has jurisdiction to deal with this matter.

29. The objector's claim is that the Co-operative Tribunal has jurisdiction in this matter by dint of section 76(1) and (2) of the Co-operative Societies Act and that the dispute concerns the business of the society and involves present members, past members or deceased members of the Society and its committee. The Court finds this position by the objector being misguided.

29. To emphasize this position, this court will rely on 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 in which the court stated:

“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.”

30. Consequently, this court finds and holds that the Notice of preliminary objection dated April 16, 2021 has no merit and proceeds to dismiss it entirely with costs to the plaintiffs herein.

31. Having found that this court has jurisdiction, the court directs that the suit herein be set down for hearing and the same be determined expeditiously on merit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21ST DAY OF JULY,2022.

L. GACHERU

JUDGE

21/7/2022

Delivered virtually in the presence of:

Joel Njonjo Court Assistant

Mr. Orina HB for Mwaniki for Plaintiffs/Respondents

M/s Kavagi for Defendant/Objector

L. GACHERU

JUDGE

21/7/2022

