



Muchemi (Suing on behalf of the estate of Johnstone Muchemi (deceased)) v Kamau & 2 others; Kenton Kijabe Co-operative Society Ltd (Interested Party) (Civil Case 507 of 2013) [2022] KEELC 14714 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL CASE 507 OF 2013
LA OMOLLO, J
NOVEMBER 10, 2022**

BETWEEN

**CHRISTINE MUMBI MUCHEMI PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF JOHNSTONE MUCHEMI
(DECEASED)**

AND

**SIMON KIHARA KAMAU 1ST DEFENDANT
MUIRURI KINYUA 2ND DEFENDANT
DAVID NDUNG’U KAMAU 3RD DEFENDANT**

AND

KENTON KIJABE CO-OPERATIVE SOCIETY LTD INTERESTED PARTY

RULING

Introduction

1. This ruling is in respect of the 2nd and 3rd defendant’s and interested party’s notice of preliminary objection dated February 25, 2022.
2. The preliminary objection is on the following ground:
 - a. That under the provisions of section 76 of the *Co-operative Societies Act* chapter 490 Laws of Kenya this court has no jurisdiction to hear or even entertain the suit.

Factual Background.

3. The plaintiff commenced the present suit *vide* an undated plaint filed on August 23, 2013.



4. Subsequently, the plaint was amended on March 18, 2020 and filed on July 22, 2020. The prayers in the amended plaint are as follows:
 - a. A declaration that the parcel of land comprised in title No Longonot/Kijabe Block 3/1513 (Kenton) is a private owned land belonging to the plaintiff.
 - b. A permanent injunction restraining the defendants, their servants and/or agents from entering, trespassing and excavating for sand harvesting in the plaintiff's parcel No Longonot/Kijabe Block 3/1513 (Kenton) or in any other way interfering with the suit property.
 - c. General and exemplary damages for trespass and environmental damage of the plaintiff's parcel of land title No Longonot/Kijabe Block 3/1513 (Kenton).
 - d. Costs of and incidental to this suit.
 - e. Any other relief this honorable court deems fit to grant to prevent miscarriage of justice.
5. The matter first came up in court on March 14, 2022 where counsel for the 2nd and 3rd defendants and the interested party informed the court that they had filed a notice of preliminary objection.
6. The hearing of the preliminary objection was slated for April 28, 2022 on which date the parties agreed to canvass the preliminary objection by way of written submissions.
7. On the June 30, 2022 parties having filed their written submissions, the court reserved the matter for ruling.

Issues for Determination.

8. The 2nd and 3rd defendants and the interested party filed their submissions on March 29, 2022.
9. The plaintiff on the other hand filed her submissions on June 17, 2022.
10. The 2nd and 3rd defendants and the interested party submit that their preliminary objection is challenging the court's jurisdiction by dint of section 76 of the [Co-operative Societies Act](#) chapter 490 of the Laws of Kenya.
11. They submit that section 76 of the [Co-operative Societies Act](#) gives original jurisdiction to other bodies other than the High Court to hear and determine certain disputes.
12. They go on to submit that as per the interested party's statement filed in court on September 20, 2013, it is evident that the interested party is a co-operative society established and registered under the [Co-operative Societies Act](#) and that the suit property which is land parcel No Longonot/Kijabe Block 3/1513 (Kenton) belongs to it and is reserved for public purposes.
13. They further submit the plaintiff's original list of documents filed on August 23, 2013 attaches a copy of a letter dated July 11, 2003 by the District Officer Mai Mahiu Division which letter confirms that the plaintiff was a member of the interested party.
14. They also make reference to item No 5 of the plaintiff's list of documents; a letter from the Ministry of Co-operative Development confirming that the plaintiff is the owner of the suit land.
15. The 2nd and 3rd defendants and the interested party submit that it is the plaintiff's own evidence that he was a member of the interested party.
16. They further submit that the dispute over the suit property is between the plaintiff who was a member of the interested party and the defendants who are also members of the interested party.



17. They relied on the cases of *Wakenya Pamoja Sacco Society Ltd v Stephen Ogambu* [2008] eKLR, *Gerald Wambua Makau v Lukenya Ranching farming Co-operative Society Limited & another* [2004] eKLR, *Daniel Kaloki Kioko & another v Willy Muasya Kioko* [2009] eKLR, *Chege Kabita v Kariobangi Housing & Settlement Co-operative Societies Ltd* [2011] eKLR, *Kagaa Farmers' Co-operative Society Ltd v Ndung'u Chege & 6 others* [2011] eKLR, *John Odiyo Adera & another v Ulinzi Sacco Society Ltd* [2002] eKLR and *Ernest Muiruri Njoroge & 28 others v Kabiru Karanja & 4 others* [1997] eKLR.
18. The 2nd and 3rd defendants and the interested party conclude their submissions by seeking that the preliminary objection be upheld and the entire suit be struck out with costs.
19. The plaintiff in her submissions identifies one issue for determination i.e whether this suit falls within the jurisdiction of the Environment and Land Court.
20. The plaintiff relies on section 5 of the *Civil Procedure Act*, the decisions of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, *Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others* [2012] eKLR and *Shadrack Mogesi Obebo & another v Commissioner for Co-operative Development & 6 others* [2018] eKLR.
21. The plaintiff submits that the prayers she is seeking in the plaint are not such as can be granted by the Co-operative Tribunal adding that they are injunctive and declaratory orders in respect of LR Longonot/Kijabe Block 3/1513 (Kenton).
22. She further submits that the tribunal does not have the jurisdiction to award general and exemplary damages for trespass and damage to the plaintiff's land adding that it is only the Environment and Land Court that has the jurisdiction to do so.

Analysis and Determination.

23. After considering the preliminary objection and the submissions filed, the only issue that arises for determination is whether this court has jurisdiction to hear and determine this matter.
24. Section 76 of the *Co-operative Societies Act* provides as follows:
 76. Disputes
 - (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.

25. The court in the case of *Republic v Gathaite Farmers' Cooperative Society Ltd & another Ex-Parte Richard Nganga Kamiro* [2013] eKLR held as follows:

From the evidence placed before this court, it clearly emerges that the applicant has never been a member of the society. He did not file any claim through a member of the Society. He did not therefore fall under the jurisdiction of the tribunal. He was out of the reach of the tribunal and any claim the society or any member of the society had against him ought to have been litigated before a court with pecuniary jurisdiction to hear the matter.

I even doubt whether the tribunal had authority to hear a dispute touching on title to land. It is noted that the land law regime has recently been overhauled. This matter was however heard under the previous land law system. Jurisdiction is everything and a court or tribunal can do nothing without jurisdiction. Jurisdiction cannot be implied but donated by statute. The jurisdiction of the tribunal is to hear disputes concerning the business of a co-operative society if such a dispute arises among members, past members, deceased members or persons claiming through members. Section 76 (2) specifies what a dispute is for the purpose of Section 76. There is no mention of the tribunal being given jurisdiction to hear land disputes in the said section.

26. Further, the court in the case of *Paul Mutua Mutwiwa v Kimeu Kyumbu & 2 others* [2014] eKLR stated as follows:

The provisions of section 13 ELC Act and article 162(2) of the *Constitution* have now vested the jurisdiction to determine the dispute on occupation, use and title to land *inter alia* in the ELC court.

The provisions of section 76(1) of Act No 12 of 1997 do not contemplate the Co-operative Tribunal to determine the ownership to land and adverse possession issues even if they were between members present, past, deceased, society, committee or officials of society and even if it was contemplated, the same has now been superseded by the enactment of article 162(2) of the *Constitution* and the creation of the ELC court. (Emphasis is mine)

This court thus holds that the court has jurisdiction to entertain the claim herein and dismiss the preliminary objection herein.

27. The plaintiff in the amended plaint alleges to be the registered owner of land parcel No Longonot/ Kijabe Block 3/1513 (Kenton). The plaintiff further alleges that the defendants have invaded her parcel of land and begun to harvest sand for selling.



28. As pointed out earlier, the plaintiff seeks for a declaration that the suit property belongs to her, a permanent injunction restraining the defendants from trespassing onto the suit property, general and exemplary damages among other orders.
29. The 2nd and 3rd defendants filed joint statements in which they alleged that the suit property was reserved as public utility land by the directors of the interested party, Kenton Kijabe Co-operative Society Limited.
30. The interested party filed a statement wherein it states that the plaintiff was not its member and was therefore not entitled to any land that belonged to it.
31. The interested party further states that land parcel No Longonot Kijabe Block 3/1513 (Kenton) belonged to it and that during the subdivision of the entire land, the suit property was reserved as public land because it was rocky and unarable.
32. As pointed out before, the 2nd and 3rd defendants and the interested party allege in their submissions that as per the plaintiff's list of documents filed in court on August 23, 2013, the letter by the District Officer Mai Mahiu Division dated July 11, 2003 and a letter from the Ministry of Co-operative Development state that the plaintiff is a member of the interested party.
33. The basis, therefore, for the preliminary objection is that the plaintiff is a member of the interested party and that what is before this court is a dispute between a past/present member of the co-operative society and the co-operative society and that this falls within the jurisdiction of the Co-operative Tribunal as provided for under section 76 of the *Co-operative Societies Act*.
34. While it is evident that there is a dispute between a past and/or present member of a co-operative society and a co-operative society, I am required to interrogate the nature of the dispute and determine if it falls within the category of disputes reserved for the Co-operatives Tribunal.
35. The question that follows is; What kind of a disputes are reserved for adjudication by the Co-operative tribunal? The answer is in section 76 (2) of the *Co-operative Societies Act* and quite evidently does not include disputes pertaining to use and occupation of land.
36. The jurisdiction of the Environment and Land Court stems from article 162(2)(b) of the *Constitution* of Kenya, 2010 and section 13 of the *Environment and Land court Act*.
37. Section 13 of the *Environment and Land court Act* provides 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;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



(e) any other dispute relating to environment and land.

38. The circumstances in *Paul Mutua Mutwiwa v Kimeu Kyumbu & 2 others* (supra) are on all fours with the present case. It was rightly held and I state again that the provisions of section 76 of the *Co-operative Societies Act* do not give the Co-operative Tribunal the jurisdiction to determine questions of land ownership.

Disposition.

39. In view of the foregoing, i find that the 2nd and 3rd defendants and the interested party's preliminary objection lacks merit and I dismiss it with costs to the plaintiff.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF NOVEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Othum for the Plaintiff.

Mr. Karaya Mbugua for the 1st & 2nd Defendant & Interested Party

Court Assistant; Ms Monica Wanjohi.

