REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE 42 OF 2001

MUSA KAMINJA KINYANJUI …….....…….. PLAINTIFF
-VERSUS-
MUNYAKA MARKETING
COOPERATIVE SOCIETY LIMITED …….....……...…….. DEFENDANT

JUDGEMENT

This is a suit brought by the plaintiff Musa Kaminja Kinyanjui (the plaintiff) by way of a plaint dated 4th November 2000. The plaint was filed on behalf of the plaintiff by Messrs. A. G. N. Kamau and Company Advocates. However, on 5th January 2004 the plaintiff filed a notice to act in person.

In the plaint the plaintiff averred that he was a member of the defendant Munyaka Marketing Cooperative Society Limited (the cooperative society). That he entered into an agreement with the cooperative society on 30th September 1997 (1977?) to buy 10 acres of tea bushes in the cooperative society's land known as plot No.64 measuring 24 acres or thereabouts. Thereafter the cooperative society subdivided the said 24 acres and a dispute arose between the plaintiff and the cooperative society. The said dispute was referred to an arbitrator under section 80(4) (of the Cooperative Societies Act Cap.490?). That the arbitration proceedings were conducted without jurisdiction, unprocedurally and irregularly and therefore the arbitrator's award and consequential orders were null and void.

The plaintiff therefore filed this suit in court and sought for two orders from this court as follows –

> **(a) A declaration that the title deed issued to the defendant in respect of the subject portion of land measuring 10 aces is null and void and that the arbitration proceedings and arbitrator's award and all orders consequent therefrom were null and void.**
> **(b) Costs and interest.**

The defendant did not enter appearance or file defence. Consequently interlocutory judgement was requested for purportedly under Order IX rule 38S Civil Procedure Rules. The request for a judgement was dated 26th March 2001 and filed on 27th March 2001. On the same date of 27th March 2001, a Mr. Masita a clerk of the plaintiff's advocate appeared before the Deputy Registrar and fixed the case for formal proof on 27th September 2001. The record does not show that an interlocutory judgement was entered by the court. However, on 6th March 2002 the court ordered that the matter would proceed to hearing of formal proof.

I think that I should first of all comment on the issue of formal proof and the issue of

service of hearing notice on the defendant as a preliminary issue before I go into considering the evidence and the substantive issues for determination in this matter. In my view, though the plaintiff applied for interlocutory judgement because the defendant did not enter appearance, he was not required to do so under the law. The provisions for entering judgement against a defendant who does not enter appearance under Order IXA rules 3, 4, and 6 apply only in situations where the claim is for a liquidated demand, a pecuniary claim for damages, or detention of goods. In our present case the plaintiff is not seeking for any of the orders covered under those rules.

Since no interlocutory judgement was entered, the issue of hearing by way of formal proof does not arise. Therefore, in my view, this case has come to me for normal hearing in terms of Order IXA rule 8, which provides –

> **"8. Subject to rule 3 in all suits not otherwise specifically provided for by this order, where any party served does not appear, the plaintiff may set down the suit for hearing under Order IXB, rule 1."**

At the hearing of the suit, the defendant's Chairman was said to have been served. However, nobody appeared in court for the defendant. I therefore proceeded to hear the case in the absence of the defendant. Actually, in terms of Order IXB rule 1 Civil Procedure Rules, there is no requirement for a plaintiff to serve a hearing notice on a defendant who has failed to enter appearance.

The plaintiff testified as PW1 and called one witness. His evidence was that he was a member of the defendant cooperative society (which previously used to be known as Turbo Munyaka Farmers Cooperative Society) since 1964. As a member of the cooperative society, he was allocated a plot by lots. He got land measuring 24.5 acres under lot number 75. In 1970 the cooperative society chose to plant tea trees at Cherangany area. This was at a different area from his original land of 24.5 acres. When tea was planted, it was not weeded and remained in the bush. The price of tea fell and the government ordered that anybody who did not take good care of tea trees would be charged with a criminal offence.

The cooperative society then divided the land on which they planted tea trees into smaller plots so that the farmers could take care of the tea trees. When the farmers were asked whether they wanted tea trees, he wrote a letter indicating that he was interested in tea trees. On 3rd September 1977, there was a general meeting of the cooperative society. The chairman of the cooperative society by the name Samuel Kimani Wainaina asked the Secretary, one Joseph Mbugua Hosea, to read the names of those who had indicated an interest in tea planting. It was only the name of the plaintiff that was read. Then the Chairman asked the members present to state at the meeting, whether they wanted to plant tea. The members said they did not want to be tea farmers.

Then one member of the cooperative society suggested that the plaintiff's 24.5 acres be transferred to the area of the farm where there were tea trees, provided that the plaintiff paid for the tea trees. The plaintiff agreed to that proposal but stated that he wanted not to be restricted on the time in which he would pay for the tea trees. The members suggested that he should pay Kshs.20,000/= for the tea trees. He agreed and an agreement was to be signed later. That agreement was signed on 14th October 1977 by himself, the Chairman, the Treasurer and the Secretary of the cooperative society.

The agreement stated that the plaintiff would pay the amount in instalments after seven years, that was, starting from 1984. On 14th June 1984 he wrote to the cooperative society to give him their bank account to start transmitting the instalments. They did not respond. He produced in court a bundle of documents as exhibits. He referred to the bundle of documents in which his letter of 14th June 1984 was document No.22. The

agreement was document No.36. He reminded the cooperative society by letter which was document No.24, but they did not respond. In 1990 he fell sick and later wrote a letter to the new Chairman of the cooperative society through a lawyer. This new Chairman of the cooperative society was the current Chairman. The letter was marked as document No.26 in the bundle of documents. That letter proposed that one acre of the plaintiff's farm be subdivided and sold and the sale proceeds be used to pay the plaintiff's debt of Kshs.25,000/= to the cooperative society. The letter was delivered by hand to the Chairman of the cooperative society by his wife.

The Committee of the cooperative society did not respond to that letter as well. Later he reported the matter to the District Commissioner and a meeting was called. It was agreed at the meeting that he pays Kshs.25,000/=. He therefore bought a banker's cheque for Kshs.20,000/= in favour of the cooperative society and left out Kshs.5,000/= because he did not know whether the cooperative society had a bank account. He thought that the cooperative society could use the Kshs.5,000/= to open a bank account. The cheque was dated 27th March 2000. When he sent the amount of Kshs.20,000/= to the cooperative society, they refused to accept the same. Then he went to the District Commissioner who took him to the District Cooperative Officer, who told him that the cooperative society had a huge amount of debts from Cooperative Bank Limited and that a government official was coming to sort out the matter. He then bought a banker's cheque for Kshs.5,000/= on 8th April 2000. When the cooperative society refused to accept that amount as well, he commenced the present proceedings in court.

After filing this suit in court, he was told to refer the matter to the Commissioner of Cooperative. He felt that he could not go directly to the Commissioner of the Cooperatives, as the Commissioner would ask him why he had not passed through the District Cooperative Officer. Therefore he wrote a letter to the Permanent Secretary Office of the President. That letter was marked as document No.52 in the bundle of documents produced in court. The letter was copied to the Commissioner of Cooperatives among others. He received a letter from the Provincial Commissioner to take to the District Commissioner. He took that letter to the District Commissioner, who wrote a letter to the District Cooperative Officer. The District Cooperative Officer wrote a letter to the Commissioner of Cooperatives who also wrote back to the District Cooperative officer.

He attended a case with the Chairman of the cooperative society. The Chairman of the cooperative society stated during that case, that the plaintiff had donated the land to Mwanga Primary School, who had already acquired a title deed. The case was adjourned for about 30 minutes, and thereafter the people who were handling the case came back and told him that they did not have authority to deal with cases of land. They advised him to go to the High Court.

The Commissioner of Cooperatives advised him in the letter marked E in the bundle of documents produced, that he should go to the High Court to nullify the titled deed of Mwanga Primary School. He insisted in evidence that the school was somewhere else not on his land.

The evidence of PW2 Simeon Kamau was that he moved from Eldoret and went to Kitale in 1972. At Kitale, he was asked by the cooperative society to measure a farm for the plaintiff. He however, found that one of the neighbours had taken all the piece of land that he intended to measure for the plaintiff. So he took the plaintiff to another place. He measured for the plaintiff a farm. The place was two miles away from the first place where he had initially measured a farm for the plaintiff. This farm had some tea plants. The land was enough for the plaintiff. It was 23 acres.

He went to the office of the cooperative society and confirmed that he had measured land

that was adequate for the plaintiff, but that part of the land had tea plants. He asked the clerk to write a letter to convene a meeting for all members of the cooperative society to discuss the issue of tea plants. The members came and they were asked whether they wanted the tea plants that were included in the plaintiff's farm. They all said that they did not need the tea plants.
Only one old man called Karanja said that he wanted the tea plants. The value of the tea plants in the plaintiff's land was assessed at Kshs.25,000/=. The plaintiff was told to take care of the tea plaints and start paying the Kshs.25,000/= in instalments after starting to harvest the tea leaves. The plaintiff agreed to pay the amount in instalments as proposed.

The members of the committee of the cooperative society later changed their minds. The new committee of the cooperative society fenced off 10 acres from the farm of the plaintiff. Then there was another committee of the cooperative society, which decided that the land with tea plants, which was fenced off belonged to the cooperative society. As far as he was aware, the land with the tea plants belonged to the plaintiff.

That was the plaintiff's case. The defendant never entered appearance nor filed a defence. The defendant was not represented at the hearing, nor was any committee member present at the hearing of the case.

In my view, the issues that arise in this case are firstly whether the plaintiff was a member of the defendant cooperative society. The second issue is whether the cooperative society gave him land which included 10 acres of tea plants for which he was to pay in instalments. The third issue is whether the plaintiff honoured the agreement for payment of Kshs.25,000 for the tea trees. The fourth issue is whether the cooperative society unlawfully fenced and took away 10 acres of the land with tea plants that they gave him and registered the same in their name. The fifth issue is whether the plaintiff is entitled to the reliefs sought in the plaint.

On the first issue as to whether the plaintiff was a member of the defendant cooperative society, the plaintiff stated so in paragraph 3 of the plaint. He testified in evidence that he was a member of the cooperative society since 1964. The cooperative society was initially known as Turbo Munyaka Farmers Cooperative Society. There is no single document in the bundle of documents tendered by the plaintiff in court that suggests any doubts to his membership. The documents from the cooperative society, including the document marked as document 37 in the bundle of documents, acknowledges the plaintiff as shareholder number 159 S/C 59. Therefore, in my view, on the balance of probabilities, the plaintiff has proved that he was a member of the defendant cooperative society.

I now turn to the second issue, as to whether the defendant gave the plaintiff a piece of land, as a member of the cooperative society which included 10 acres with tea plants. The plaintiff averred in the plaint that the defendant sold to him ten (10) acres of land having tea bushes by an agreement dated 30th September 1997. The 10 acres were part of 24 acres on plot No.64 which the defendant allocated to the plaintiff. (I think the averment to 1997 in the plaint was a typographical error. They year should be 1977, as evidenced by the documents.)

The plaintiff further testified in evidence that he was allocated land by the defendant by lots. He got lot No.75 which was land measuring 24.5 acres. Thereafter the defendant planted tea trees in another plot which was subdivided among members of the cooperative society in order to take care of the tea leaves. He wrote to the cooperative society on 3rd September 1977, informing the cooperative society that he wanted land with tea plants. Members of the cooperative society were later called for a general meeting and it happened that he was the only member who had written requesting for the land with tea plants. Then members of the cooperative society agreed that his 24 acres

should now be in the area with tea plants. He was to sign an agreement and pay Kshs.20,000/= for the tea plants in instalments. That agreement was signed on 14th October 1977 by himself, the Chairman, Treasurer and Secretary of the cooperative society. He was given 7 years up to 1984 to start paying in instalments.

I have perused the document produced by the plaintiff as No.37 in the bundle. It was an agreement signed by the plaintiff, the Chairman, Treasurer and Secretary of the cooperative society that the plaintiff purchased 10 acres of tea trees on plot No.75. He was to pay Kshs.2,500/= per acre totaling Kshs.25,000/=. Payment would start after 7 years from 1977 at the rate of 25%. In my view, on the balance of probabilities, the plaintiff has proved that he was indeed allocated land by the defendant who sold to him 10 acres of land on plot 75, which had tea trees, but he was to pay in instalments after 7 years, which would be from 1984.

Now I turn to the issue as to whether the plaintiff honoured the terms of payment in instalments. I have perused the letters marked as documents 22, 23 and 24 in the bundle of documents. They are letters written in 1984 and 1985 to the Chairman of the cooperative society by the plaintiff. The letters were asking the cooperative society to send the plaintiff their account number so that he could send the account number to Kenya Tea Development Authority (KTDA) for KTDA to start deducting the instalments for the tea leaves. These letters appear not to have been responded to by the defendant. There is evidence that the plaintiff pursued the matter through several offices by way of correspondence. He even obtained banker's cheque number 002486 dated 27th March 2000 and banker's cheque number 003909 dated 8th April 2000 from Kenya Commercial Bank Limited in favour of the defendant. These cheques are exhibited as document No.27 in the bundle of documents. In my view, the plaintiff did not default on his commitments to pay in instalments, as envisaged in the agreement. He made all efforts to pay.

Did the defendant unlawfully/illegally take over the said plot of 10 acres and obtain title? From the documents submitted by the plaintiff, specifically the document marked as No.122, the Chairman of the cooperative society Mr. A. Ndegwa Kiruri advertised for sale the 10 acres of land which used to belong to the plaintiff. The said advertisement was not dated, however, the advertisement is stamped 28th May 1987 – therefore I take it that that advertisement was done in 1987.

It is apparent from the face of that advertisement that the plaintiff had defaulted to make payments. The plaintiff however, stated in evidence that he had attempted to make payments from the year 1984. He produced copies of letters to that effect. The defendant has not defended itself. With the efforts to make payment that the plaintiff has shown in evidence, I find that the defendant irregularly/illegally acquired the land in question.

The defendant was not entitled to take the subject land from the plaintiff. That land was plot number MAKUTANO/KAPSARA BLOCK 2/TURBO MUNYAKA (325) registered in the name of the cooperative society (Turbo Munyaka Society).

I now turn to the issue as to whether the plaintiff is entitled to the reliefs sought. This matter has taken many turns and twists. There have been many official complaints by the plaintiff. The matter has been handled by an arbitrator, the Commissioner of Cooperatives, officials from the Provincial Administration, the Lands Office and the police. It has been a long and involving matter for the plaintiff.

The arbitrator at Kitale – Fanuel Kubia Akatwa on 23rd April 1991 awarded the subject land to the cooperative society. After this suit was filed in 2005, the matter was again referred to the Cooperatives Tribunal. On 20th June 2003 the Tribunal observed that title had already been issued before the tribunal case, that was Nairobi Cooperative Tribunal

case No.6 of 2002, was filed on 15th November 2002. The Cooperative Tribunal therefore decided that, as the dispute was on land registered under the Registered Land Act (Cap.300), it did not have jurisdiction to entertain the same. Consequently, it dismissed the case of the claimant, that is the plaintiff herein.

Now, is the plaintiff entitled to the reliefs sough in this case? The reliefs sought before this court are –

(a) A declaration that the title deed issued to the defendant in respect of the subject portion of land measuring 10 acres is null and void and that the arbitrator's award and all orders consequential therefrom were null and void.

(b) Costs and interest.

In my view the first prayer in the plaint can be split into two prayers. Thus the prayers will be –

i) A declaration that the title deed issued to the defendant in respect of the subject portion of land measuring 10 acres is null and void.
ii) A declaration that the arbitration proceedings and the arbitrators award and all orders consequential therefrom were null and void.
iii) Costs and interest

In respect of the first prayer that the title deed issued to the defendant in respect of the subject portion of land measuring 10 acres is void, the plaintiff has not identified the title deed in question in the plaint. In evidence, he also did not identify the particular title deed in question. I have perused all the documents submitted by the plaintiff in court. There is an extract copy of the land register for Plot No. Makutano/Kapsara Block 2/Turbo Munyaka/325 measuring approximately 4.047 hectares. Title was issued under the Registered Land Act (Cap.300) to Turbo Munyaka Society on 6th February 1998. The interest is absolute. The title was closed on 22nd January 2001 when new subdivision numbers 463 and 464 were issued. This was before the suit herein was filed in court on 7th March 2001.

There is a title in the name of Mwanga Primary School issued on 22nd January 2001 in respect of title MAKUTANO/KAPSARA BLOCK 2/TURBO MUNYAKA/464 for 2.64 hectares. This title was issued before the suit herein was filed. The said Mwanga Primary School is not a party to these proceedings.

It is apparent from the evidence on record and documents produced by the plaintiff that the subject land in contest was plot No. MAKUTANO/KAPSARA BLOCK 2/TURBO MUNYAKA/325 which measured 4.047 hectares, which is almost 9 acres. According to the record in the land register which was document No.85 produced by the plaintiff, the said land was transferred from the Government of Kenya on 6th February 1998 to Turbo Munyaka Society of P.O. Box 323 Kitale. In my view therefore, this is not a first registration under section 143 of the Registered Land Act (Cap.300), as the land was first registered in the name of the Government of Kenya and then transferred to Turbo Munyaka Society. The first entry in the register entered on 6th February 1998 shows the proprietor as the Government of Kenya. The land was on the same date transferred to Turbo Munyaka Society. The land was subdivided on 22nd January 2001 and plot Nos. 463 and 464 were created. On the same date a certificate of title for plot No.464 was issued in the name of Mwanga Primary School.
Under section 143 of the Registered Land Act (Cap.300) the title to Turbo Munyaka Society can be rectified and registration cancelled or amended if the registration was obtained, or made by fraud or mistake, as it is not a first registration. The said section

143 of the Registered Land Act (Cap.300) provides –

> **"143(1). Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**
> **(2) The register shall not be so rectified so as to affect the title of a proprietor who is in possession and has acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."**

In our present case, I see no evidence to show that Mwanga Primary School had knowledge of any fraud or omission or mistake at the time that it acquired part of the land in question. The said Mwanga Primary School is also not a party to the proceedings herein. In terms of section 143 (2) of the Registered Land Act (Cap.300), I am not able to interfere with their title, as I see no fraud or omission or mistake on their part.

The burden is on the plaintiff to establish a case of fraud or mistake or omission in terms of section 143 of the Registered Land Act (Cap.300), on the balance of probabilities. In my view, the plaintiff has established such a case against the defendant. The defendant deliberately took the land in contravention of agreement, while the plaintiff was striving to honour the agreement. The defendant has not filed a defence herein. They never attended court. They committed an act of fraud by failing to fulfill what they had promised the plaintiff and registering the land in their name. However, this finding only affects plot 463 as plot No.464 has already been transferred to an innocent party. I would have ordered the cancellation or modification of title for plot No.463 and awarded the subject land to the plaintiff, if it were not for the provisions of the Cooperative Societies Act (Cap.490), which apply to this case. The provisions of the Cooperative Societies Act (Cap.490) apply to this matter as it involves a member of a cooperative society and the cooperative society. It was initially referred to arbitration under the Cooperative Societies Act (Cap.490).

This then leads me to the issue as to whether this court can grant the prayer declaring the decision of the arbitrator which was given under the Cooperative Societies Act (Cap.490) as null and void in this suit.

I have perused the decision of Fanuel Kubia Akwata the arbitrator dated at Kitale on 23rd April 1991. The arbitrator ordered that the cooperative society should possess the 10 acres plot of tea leaves. That the plaintiff herein pays the cooperative society Kshs.20,250/= as interest for the amount of Kshs.25,000/= which he had never paid to the society. That the cooperative society should pay all outstanding debts for the tea leaves plot to KTDA. The parties were reminded by the arbitrator that if any of them felt aggrieved, they could appeal to the Commissioner of Cooperative Development within two months from the date of the award.

At the time of that decision the Cooperative Societies Act (Cap.490) was in operation. It was later repealed by Act No.12 of 1997.

In terms of section 80 of the Cooperative Societies Act (Cap.490), a dispute between a member and a registered cooperative society concerning the business of the cooperative society should be referred to the Commissioner of Cooperatives. The Commissioner is required to refer the dispute to an arbitrator or arbitrators appointed by him. The arbitrator is required to make an award, whose appeal lies to the Commissioner. If no

appeal is preferred then the award is filed in the High Court and the court is required to enter a judgement in terms of the award and issue a decree thereon which is enforceable as a decree of the court. There is no provision for appealing to the High Court from the award of the arbitrator or the decision of the Commissioner. However, a appeal from the decision of the Commissioner lies to the Minister and an appeal from the Minister's decision lies to the High Court.

In our present case the documents on record show that the arbitrator made his award on 23rd April 1991. It was filed in the High Court at Eldoret as HC. Misc. Civil Application No.80 of 1992, for adoption. It was to be mentioned on 12th February 1993.
No appeal appears to have been filed to the Commissioner of Cooperative Development challenging the award of the arbitrator. Rule 56 of the Cooperative Societies Rules required such an appeal to be filed within two months. The plaintiff has now come to this court by way of a plaint seeking the nullification of the arbitrator's award.

In my view, this court has no jurisdiction to nullify the arbitrator's award, through this suit. The Cooperative Societies Act (Cap.490) as amended, is clear on the subject. The dispute between the plaintiff and the cooperative society was correctly referred to arbitration under section 80 of the Act. The arbitrator made his award on 23rd April 1991. An appeal by any aggrieved party lay with the Commissioner of Cooperative Development. No appeal was preferred within the two months period provided for by law. The Act specifically provides that this court can only entertain the matter on appeal from an appeal to the Minister of Cooperatives. The plaintiff has come to this court, not by way of appeal as provided for by law, but by way of a fresh suit.

The suit was filed on 7th March 2001. The Cooperative Societies Act (Cap.490) was repealed and replaced by the Cooperative Societies Act No.12 of 1997. The new Act also under section 76 requires that disputes between a registered cooperative society and a member to be referred to a Tribunal. An appeal lies to the High Court from the decision of the Tribunal as provided for under section 81 of that Act.

Either way, this court would have no jurisdiction to deal with the decision of the arbitrator or the Tribunal except through an appeal. This court cannot therefore deal with the arbitrator's award in a suit and annul the arbitrator's award. Therefore I find that the plaintiff is not entitled to the relief sought against the decision of the arbitrator in this suit. He is also not entitled to a declaration for nullification of the title issued to the defendant in terms of section 143 of the Registered Land Act (Cap.300) as the issue of the land was determined by the arbitrator on 23rd April 1991 in accordance with the provisions of section 80 of the Cooperative Societies Act (Cap.490)

For the above reasons, I find that the plaintiff cannot obtain from this court the reliefs sought. He should have appealed from the arbitrator's award as provided for under the Cooperative Societies Act (Cap.490), instead of coming to this court by way of suit.

Consequently, I dismiss the suit and decline to grant the reliefs sought. I make no order as to costs as the defendant did not appear or defend the suit.

Right of appeal explained.

Dated and delivered at Eldoret this 23rd Day of June 2005.

George Dulu

Ag. Judge

In the Presence of: Musa Kaminja Kinyanjui - plaintiff