



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 80 OF 2003

GERALD WAMBUA MAKAU.....PLAINTIFF

VERSUS

LUKENYA RANCHING & FARMING

CO-OPERATIVE SOCIETY LTD & ANO.....DEFENDANT

R U L I N G

The respondents filed a notice of preliminary objection dated 28.10.2003 to the effect that the suit is bad in law, an abuse of court process and offends provisions of the co-operatives societies Act and should therefore be struck out. The objection had also been raised in the defendants defence filed on 28.10.2003. Counsel for respondents argues that by virtue of section 76(1) of the Co-operative Societies Act a matter between a member, and deceased member should be referred to the co-operative Tribunal and that by virtue section 81 of the said co-operative societies Act, the high court is an appellate court and the decision of the high court is final. Counsel for the applicant contends that the prayers sought are those of an injunction and the court has jurisdiction as indeed other previous Judges at this court have entertained such matters and given orders of injunction in HCCC 58/01 and HCCC 484/98 in which the court held it had inherent jurisdiction to grant the equitable remedy of injunction. Counsel further argued that the common wealth countries also adopt the same stance as elaborated in Justice Kuloba's book on Principles of injunctions at page 72.

I have considered all the points raised for the objection and against.

As per the plaint filed in this court on 8.10.2003 the prayers sought by the plaintiff are for an injunction to issue permanently restraining the defendant, the servers or agents from entering, demarcating, surveying in any other way interfering with the peaceful occupation and use of the plot by personal representations of the estate of the deceased; a declaration that the original survey and map done in 1974 are valid and a declaration that the deceased and heirs after him were in continuous occupation and possession of the land since 1975 – 1989 uninterupted and general and exeplanary damages. In the plaint it is admitted that the 1st defendant is a co-operative society, the plaintiffs brings the action on behalf of one Justus Makau who was a member of the 1st defendant. There is no doubt that the plaintiff and the deceased are members of the 1st defendant. It is not clear from the proceedings whether 2nd defendant is also a

member of the 1st defendant but from the arguments before the court, it seems that counsel for plaintiff is not denying that this claim should be filed before the co-operative tribunal even though this court can grant orders of injunction.

I have read the authorities cited by the counsel for applicants. They are not binding on this court but can only be persuasive and may be considered by this court for purposes of consistency.

I do note that orders of 25.2.1999 when the ruling in HCCC 484/98 was given the co-operative tribunal was not constituted and was not functional. It was constituted in July, 2000 and started functioning thereafter. So though the law was enacted that all disputes be referred to the co-operative tribunal there was a vacuum as the old system of referring disputes to the Minister had been done away with the enactment of the co-operative societies Act. The parties could only come to the High court which I do concede has inherent jurisdiction in the grant of equitable remedies like the one of injunction.

Section 76(1) of co-operative societies Act is very clear that all disputes between the society, its members and past members shall be referred to the tribunal. Though there are no specific provisions regarding the grant of the equitable remedy of injunction the co-operative tribunal does issue injunctions. Section 76 Cooperative Societies Act does not limit the nature of disputes that are to be referred there provided they fall under that section. The tribunal makes its own rules and adopts some provisions of the civil Procedure Act one of them being the grant of temporary injunctions. I believe the legislature had some mischief it needed to deal with when this Act was enacted. The co-operative societies are ran in their own peculiar way and the legislature saw it fit to come up with specific laws to suit their needs and a specific machinery to resolve their peculiar disputes which the court could not do at first instance and therefore all disputes as specified under the Act should be referred there.

Further to the above section 81 of the said co-operative Societies Act provides that the high court will be an appellate court in respect of the cases from the co-operative tribunal. If parties are allowed to file their matters before the high court at first instance means that they shut out any other party who might wish to appeal against the decision of the high court. The intention of the legislature is clear, that the matter be first filed in the tribunal then to the high court in the event of an appeal.

Even if I were to agree that this court has inherent jurisdiction to grant the equitable remedy, in Kuloba principles of injunctions, the stance taken is that this court would only grant a temporary injunction pending the hearing of the substantive action in a court of competent jurisdiction where the main matter to be finally determined.

In the present case, the whole suit is filed in this court. There is no indications that the plaintiffs intent to proceed to the tribunal for the final orders sought in the other prayers. Further more this court might have been persuaded to grant such temporary injunction if it was shown that the matter was so urgent that awaiting to go the tribunal would cause irreparable damage to the parties or that the tribunal was not accessible for reasons that there was no officer on duty at the tribunal to grant such orders as sometimes happens in the other tribunals. No reason has been given why the plaintiff came to this court.

The sum of the foregoing is that this matter is improperly before this court. It is an abuse of court process and should have been filed in the correct forum. The court lacks jurisdiction to entertain the matter as filed and it is struck out with costs to the respondent.

Dated, read and delivered at Machakos this 11th day of March, 2004.

R. WENDOH

JUDGE

