



REPUBLIC OF KENYA



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New Nzai Farmers Co-operative Society Limited v Muange (Environment and Land Appeal 39B of 2018) [2025] KEELC 5142 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 39B OF 2018**

EO OBAGA, J

JULY 10, 2025

BETWEEN

NEW NZAUI FARMERS CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND

MUTUA MUANGE RESPONDENT

(Being an appeal from the Judgment and order of the Cooperative Tribunal delivered on 4th May, 2018 at Nairobi by A. K. Itbuku, R. Mwambura and H. Shidiye in Cooperative Tribunal case Number 214 of 2006)

JUDGMENT

Background and Introduction

1. The Appellant was registered under the *Cooperative Societies Act* on 22nd August, 1975. The Respondent was among the Appellant's members and at some stage was an official of the Appellant. On 16th July, 1976 Masaku County Council allotted the Appellant plot No. 103 measuring 22 ft x 100ft at Matiliku Market. An allotment letter was issued on 26th March, 1980. In 1997, the Respondent took over the Appellant's plot claiming that it was his plot known as plot 110 and 111. The takeover forced the Appellant to file a suit against the Respondent in *Nairobi RMCC No. 7470 of 1997*. This case was transferred to Machakos where it became *Machakos CMCC No. 223 of 2000*. The suit was subsequently withdrawn with costs to the Respondent.
2. The Appellant filed a claim against the Respondent at the Cooperative Tribunal at Nairobi being *Tribunal Case Number 214 of 2006*. This case was fully heard and was dismissed on 4th May, 2018. Aggrieved by the judgment, the Appellant preferred an appeal to this court in which it raised the following grounds of appeal.
 1. The honourable Tribunal erred in law in not granting the claimants prayer sought in light of the oral documentary evidence produced and availed before it.



2. The honourable Tribunal erred in law and facts by failing to clearly and justifiably evaluate all the oral and documentary evidence adduced and in particular before the Tribunal in favour of the claimant.
3. The honourable Tribunal erred both in law and facts in analysing the provisions of the *Evidence Act* and in particular Section 107 (1) and 108 by gravely shifting the burden of proof even in cases where the burden had ideally shifted to the Respondent.
4. The honourable Tribunal did not appreciate the weight and gravity of the subject matter before the Tribunal and therefore missed the opportunity to adequately and effectively address the issues raised in the proceedings before it.
5. The honourable Tribunal failed in their determination and adjudication of the matter to understand the preamble of the Cooperative Societies Act and in particular as relative to the establishment of the Cooperative Tribunal, the purport and import of Section 78 of the *Cooperative Societies Act* Cap 490 the laws of Kenya.
6. The honourable Tribunal failed to critically evaluate, examine and rightly determine and make a considered decision and in particular as to the evidence adduced before the court and the evidence of the surveyor who gave misrepresentation, confused, contradictory, unreliable and untruthful evidence before it.
7. The honourable Tribunal failed to analyse the Respondent's evidence which was crafted and confined to conceal material facts, uncooperative and refusal to answer questions in cross examination.
8. The honourable Tribunal erred in law in failing to notice that the Respondent did not produce any document to authenticate his ownership such as an allotment letter in particular and the source of his ownership.
9. The honourable Tribunal failed to adjudicate the dispute before it as observed in paragraph 24 of the award "it is also clear that this dispute is not over in respect of the occupation and ownership of the disputed plot", and by this statement it is clear that the honourable Tribunal failed to conclusively adjudicate the real issues in this matter as the court of first instance, hence keeping the litigation part in perpetual suspense.
10. The honourable Tribunal failed to appreciate the principles of equity, justice, good conscience, natural justice, public interest and good governance involving a body corporate of which the Respondent was a member during such time the society acquired the subject property.
11. The honourable Tribunal failed, deliberately or otherwise, to in a reasonable and a judicious manner determine the matter before it but resulted to relying on extraneous and irrelevant pieces of evidence of the Respondent who refused to abide by the judicial precepts and procedure, but rather chose to hide and withhold evidence and giving him the property he did not deserve was a total miscarriage of justice and the rule of law.

The Parties Submissions

3. The parties were directed to file written submissions. The Appellant filed submissions dated 15th November, 2019 and filed in court on 22nd November, 2019. The Respondent filed his submissions dated 25th January, 2025.



Appellant's Submissions

4. The Appellant submitted that evidence had been tabled before the Tribunal which showed that the Appellant had been in possession of plot 103 since 1976 when it was allotted to it. It was submitted that the Respondent who was a member of the Appellant and an official never raised any issues over plot 103 until after the establishment of Makueni County Council in 1992 which purported to allocate the Respondent plot numbers 110 and 111 which he claimed were in the same location as plot 103.
5. The Appellant further submitted that though the surveyors who were engaged to identify the location of plot 103 vis-à-vis plot 110 and 111 were unable to locate the plots, the location of plot No. 103 was not in doubt as it had an iron sheet structure which was in existence since 1965. The structure had been built by the owners of Kitui Gineries Limited. This is the plot which was allotted to the Appellant in 1976. The Appellant leased the structure to Redeemed Gospel Church in 1991.
6. The Respondent first laid claim to plot 103 in 1997 claiming that it was plot 110 and 111. On the issue of mesne profits and general damages the Appellant submitted that a global figure of Kshs.3,000,000/= will suffice. Reliance was placed on the case of *Kenya Hotel Properties Limited v Willesden Investment Limited* (2009) eKLR where the Court of Appeal upheld an award of Kshs.22,729,800 general damages for continuous trespass for 15½ years. The Appellant also relied on the case of *Janendra Raichand Shah & 2 Others v Mistry Waiji Naran Mulfi* (2014) eKLR where Justice Tuiyot (as he then was) awarded mesne profits of Kshs.7,500,000/=.

Respondent's Submissions

7. The Respondent submitted that the appeal herein is an abuse of the process of the court as it is contrary to Order 42 Rule 1(2) of the *Civil Procedure Rules*. He submitted that the appeal does not have any order or decree appealed against and it is argumentative.
8. The Respondent also submitted that where a society fails to cause its accounts to be audited in respect of business of the previous financial year, members of the committee shall automatically lose their position in the next general meeting. The Respondent further submitted that no elections have been held for over 20 years and that as such the Appellant have no officials to proceed with any litigation.

Analysis and Determination

9. I have carefully gone through the record of appeal as well as the submissions by the parties. The duty of a first appellate court was clearly set out in the case of *Selle v Associated Motor Boat Co.* (1968) EA 123. From the evidence adduced, it is clear that both the Appellant and the Respondent are claiming same space on the ground but using different plot numbers. The Appellant claims plot 103 measuring 22x100 feet. The Respondent claims the same space which he says is plot 110 and 111. As a matter of fact the Respondent states that he has no claim over plot 103. He says his plots are plot numbers 110 and 111 but are on the same spot where the Appellant also claims to own. The only issue for determination is whether the disputed plot is number 103 or whether it is 110 and 111.
10. To answer the issue in contention, the history of plot No. 103 is important. Plot No. 103 was allotted to the Appellant by Masaku County Council on 16th July, 1976. A formal letter of allocation was issued on 26th March, 1980. The allocation of plots was being done by the area councillors who would then table the allocations before the relevant committee of the County Council in which the plot was situate.
11. In the instant case, plot 103 was allotted to the Appellant by then Councillor John Mwaka Mailu who testified as claimant's witness 2 (CW2). He stated that he was a member of Appellant. The members of



- the Appellant approached him for allocation of a plot at Matiliku Market. He carried out investigations and found that the plot was available for allocation. He then asked the Appellant's members to apply for it. The plot had a store which was built of metal (mabati). He took the application before the allocation committee which allotted the plot to the Appellant. He stated that the plots at Matiliku market were upto number 103. He further stated that plot numbers 104 to 122 were allocated as Kiosks and that plot Nos 110 and 111 do not exist as plots at Matiliku market.
12. CW4 Julius Mutulu Malungu was area councillor between 1984 and 1988. He testified that during his tenure, he tried to create plot Nos. 104 – 126 but the plots were nullified by the Public Health Officer. He stated that plot 110 and 111 do not exist. What exists are kiosks which surround the main market.
 13. The minutes of the Town Planning, Market and Housing Committee held on 16th July, 1976 show that plot No. 103 was allocated to the Appellant. Among the members present was Councillor John Mwaka who had facilitated the allocation of the plot to the Appellant.
 14. In November, 1991, Redeemed Gospel Church requested the Appellant to give them the mabati store to use as a church. On 10th July, 1996, the Appellant and Redeemed Gospel Church Matiliku entered into a lease agreement with the Appellant in which the church was to pay Kshs.800/= per month for the mabati structure. There are correspondence between the Appellant and Kitui Gineries Limited where the Appellant who had been using the store built by Kitui Gineries Ltd wanted to purchase it. This is after Kitui Gineries Limited ceased operating the business of buying cotton. These letters are dated 23rd January, 1987, 10th March, 1987, 7th July, 1987 and 14th August, 1987 all from Kitui Gineries Ltd. The letters by the Appellant are dated 4th March, 1987 and 25th August, 1987. They all touch on the sale of Matiliku store.
 15. The Respondent was a committee member of the Appellant as confirmed by the minutes of 29th July, 1983 where his name appears at number six (6). In the letter of 14th August, 1987, Kitui Gineries Ltd wrote to the Appellant pointing out that the Appellant had been using their store for the last six years without payment of any rent. They asked the Appellant to pay rent at the rate of Kshs.500/= per month with effect from January 1987 as they had waived the previous years' rent. It is therefore clear that the Respondent was aware that the Appellant was the one using the store and there is no basis for him to claim that he was the one who authorised Kitui Gineries Limited to build the store in 1965 hence the land belonged to him. The Respondent is the one who had given the land where Matiliku Market was established. There was no evidence given to either show that he retained the area where the store was built or that he was allocated the particular area.
 16. The plots at Matiliku market were allocated by Masaku County Council before Makueni County Council was established in 1992 and officially commenced business in January, 1993. The plots allocated by Masaku County Council were upto number 103. Attempts to increase them to 123 was nullified. Those nullified plots were retained as kiosks. The Respondent claims to have been allocated plot Nos. 110 and 111 by Makueni County Council. The receipts issued to him in respect of plot No. 110 are between the years 2006 and 2010. There was no evidence adduced by the Respondent to show when plot 110 was allotted to him. He did not have letter of allotment and this is the plot which he claims houses the mabati structure.
 17. It is therefore clear that plot 103 where there is a mabati structure is the plot which was allotted to the Appellant. It was therefore wrong for the Tribunal to make a finding that the Appellant had failed to prove its case on a balance of probabilities. There was ample evidence which was placed before the Tribunal to show that the disputed plot is the one which was allocated to the Appellant. The iconic mabati building showed the position of the allocated plot.



18. There is evidence that the Respondent trespassed on to the Appellant's plot and has been collecting rent from a church to which he has leased the mabati structure. He trespassed on to plot 103 in 1997. The trespass has been continued for 28 years. The Respondent has been getting rent from the premises owned by the Appellant. The law is clear that one cannot claim both mesne profits and general damages.
19. There was no evidence led on mesne profits which are in the nature of special damages. However as the Appellant has proved that the Respondent trespassed to plot 103 Matiliku market and is still there, the Appellant is entitle to general damages. The Respondent has been on the suit property for 28 years. I assess general damages in the sum of Kshs.200,000/=.

Disposition

20. I allow the Appellant's appeal. The judgment of the Tribunal delivered on 4th May, 2018 is hereby set aside. I allow the claimant's claim in terms of prayer (a) (b) and (d) as sought before the Tribunal and general damages of Kshs.200,000/= which shall attract interest at court rates from the date of this judgment. The Appellant shall have costs of this appeal.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 10TH DAY OF JULY, 2025.

In the presence of:

Mr. Masavilu for Mr. Mbuthia for Respondent.

Mr. Muriuki for Appellant

Court assistant – Steve Musyoki

