



**Mutuku v Mkono Poa Housing Co-operative Society Limited (Environment & Land Case E003 of 2023) [2023] KEELC 21361 (KLR) (7 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21361 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E003 OF 2023  
CA OCHIENG, J  
NOVEMBER 7, 2023**

**BETWEEN**

**SAMMY KAVUU MUTUKU ..... PLAINTIFF**

**AND**

**MKONO POA HOUSING CO-OPERATIVE SOCIETY LIMITED .. DEFENDANT**

**RULING**

1. What is before Court for determination is the Defendant's Notice of Preliminary Objection dated the 13<sup>th</sup> March, 2023 where it sought for the suit to be struck out with costs on the following grounds:-
  - a. That this Honourable Court lacks jurisdiction to hear and determine this matter under Section 76(2) of the *Cooperative Societies Act* Cap 490 Laws of Kenya.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

**Analysis and Determination**

3. I have considered the Notice of Preliminary Objection dated the 13<sup>th</sup> March, 2023 including the rivalling submissions and the only issue for determination is whether this suit should be struck out with costs.
4. The Defendant in its submissions provided a background of this matter and contended that this court lacks jurisdiction to handle the dispute herein as the Plaintiff is its member. Further, that it entered into a Sale Agreement with the Plaintiff dated the 3<sup>rd</sup> September, 2021 for purchase and sale of various parcels of land. It sought for the Plaintiff's suit to be dismissed with costs. To support its arguments, it made reference to Section 76 of the *Cooperative Societies Act* as well as the following decisions: *Claudia Mueni Mutungi v Fep Sacco Society Limited & 2 others* (2021) eKLR and *Mwalimu National Sacco Limited & another v Abigael Kerubo Moraa* (2021) eKLR.



5. The Plaintiff in his submissions contend that his cause of action against the Defendant stems from the breach, by the Defendant, of the Sale Agreement dated 2<sup>nd</sup> July, 2021. He argues that in the Defendant's Defence, it admits part of his claim. Further, that careful scrutiny of the Defence reveals that the Defendant is disputing the quantum of the balance of the purchase price. He insists that the Defendant did not challenge the jurisdiction of this Court in their Defence. He further submits that there is no statement by any of the Defendant's Officers, no List of documents or any documentary exhibit, to demonstrate that he is its member. He reiterates that the objection hereof is on the allegation that he is a member of the Defendant and this will require the Court to call in evidence to ascertain it. To support his averments, he relied on the following decisions: *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributor Ltd* (1969) EA 696.
6. Section 76(2) of the *Co-operative Societies Act* provides that:-
- “(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.”
7. From a perusal of the Plaint, I note the Plaintiff claims he was the owner of land parcel number Mavoko Town Block 3/2791 and he entered into a Sale Agreement with the Defendant dated the 2<sup>nd</sup> July, 2021 for the sale of the said land. Further, the purchase price was Kshs 26,000,000. He stated that the Defendant breached the terms of the Sale Agreement by paying only Kshs 8,000,000 as purchase price. He hence claims specific performance as well as General Damages for breach of contract. The Defendant in its Defence denied the averments in the Plaint but admitted that it had already paid Kshs 14,030,000 as purchase price, which was inclusive of eight plots worth Kshs 2,000,000 that the Plaintiff purchased from it, in Mavoko Town Block 3/2791.
8. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited* (1969) EA 696; the Court held that:-
- “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 unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
9. In the current scenario, insofar as the Defendant claims the Plaintiff is its member, it did not plead this in the Defence nor provide documentary evidence to that effect. The Defendant has not denied that the Plaintiff was owner of the suit land and they had an Agreement for Sale, with him over it. Further, I note at paragraph 5 of the Defence it admits having paid a portion of the purchase price. The Defendant in its Defence, did not deny the jurisdiction of this Court. The Defendant in its submissions has relied on decisions that I opine are not binding on this court. It is my considered view that since the issues raised in this suit touch on breach of contract and dispute as to the amount of purchase price outstanding, I find that this will require evidentiary proof. Further, from a keen reading of Section



76(2) of the *Cooperative Societies Act*, I am of the view that the provisions therein deal with a claim for a debt between a Cooperative Society with its members and vice versa but not breach of contract including claim for specific performance where the Cooperative Society was sold for land.

10. Based on the facts as presented while associating myself with the decision cited above, at this juncture I find that the instant Notice of Preliminary Objection does not raise a pure point of law, as it requires the issue of the Plaintiff's membership with the Defendant as well as outstanding amount of purchase price owed to the Plaintiff, to be ascertained. I hence find the instant Notice of Preliminary Objection premature as this is not what was envisaged under Section 76(2) of the *Cooperative Societies Act*. I opine that this suit should be set down for hearing and determined on its merits. Further, by dint of Section 13 of the *Environment and Land Court Act*, I find that this court has jurisdiction to determine the issues raised herein.
11. In the circumstance, I find the Notice of Preliminary Objection dated the 13<sup>th</sup> March, 2023 unmerited and will disallow it.
12. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

