



REPUBLIC OF KENYA



Kericho District Co-operative Union Limited v Hunjan & 6 others (Environment & Land Case E020 of 2021) [2022] KEELC 14531 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E020 OF 2021
MC OUNDO, J
NOVEMBER 3, 2022**

BETWEEN

KERICHO DISTRICT CO-OPERATIVE UNION LIMITED PLAINTIFF

AND

PARMINDER SINGH HUNJAN 1ST DEFENDANT

STANLEY MUTAI 2ND DEFENDANT

NEWTON KIBET MAINA 3RD DEFENDANT

STEPHEN KIPRONO KOECH 4TH DEFENDANT

JOSEPH KIPKORIR TOO 5TH DEFENDANT

**CHARLES KIPRUTO SAINA (BEING SUED AS FORMER
EXECUTIVE OFFICIAL OF KERICHO DISTRICT CO-OPERATIVE
UNION) 6TH DEFENDANT**

REGISTRAR OF LAND KERICHO REGISTRY 7TH DEFENDANT

RULING

1. Before me for determination it is a notice of preliminary objection dated the December 1, 2021 and filed by the defendants herein objecting to the jurisdiction of the court to hear and determine the suit by virtue of the provisions of section 76 of the *Co-operative Societies Act*. The defendants further seek orders that the suit is incompetent, frivolous, vexatious, bad in law, fatally defective and an abuse of the court process.
2. The preliminary objection was disposed of by way of written submissions to which the defendants, in support of their application, pegged their preliminary objection on the decided case in *Seven Seas Technologies Limited vs Eric Chege* [2014] eKLR and the decision in the *Owners of Motor Vessel Lilian*



- S' vs Caltex Oil Kenya Limited* [1989] eKLR to submit that where a court had no jurisdiction to try a matter, it ought to down its tools. That jurisdiction was the authority upon which the court could decide the matter that was litigated before it and that such jurisdiction was conferred upon the court by either a legislation or the *Constitution* or both.
3. That the provisions of section 76 of the *Co-operative Societies Act* was clear to the effect that any dispute between the co-operative society and its members including past members for any debt or demand due to it was to be referred to the tribunal established under the *Co-operative Societies Act*. That the plaintiff, being a co-operative society ought to have referred this matter to be heard and determined by a tribunal which was the entity that was clothed with jurisdiction.
 4. That the court had no jurisdiction over matters reserved for a quasi-judicial tribunal that had been created by the act of parliament. That the co-operative had inbuilt dispute resolution mechanisms which were self-embodiments that could not be wished away.
 5. That under section 81 of the Act, a party who was dissatisfied with the award of the tribunal would then appeal to the High Court whose verdict would be final. That the court could not assume both the appellate and original jurisdictions.
 6. The defendants further relied on the decided case in *Alex Malaikhe Wafubwa & 7 others vs Elias Nambakha Wamita & 4 others* [2012] eKLR to submit that the plaintiff had deliberately avoided the procedures in the *Co-operative Society Act* to settle the dispute. That since the court lacked jurisdiction, the matter before it should be struck of and/or dismissed with costs.
 7. In opposition to the preliminary objection, the plaintiff submitted that they had instituted this matter vide a plaint dated the July 9, 2021 for a claim of fraud against the defendants on the sale and disposal of parcel of land LR No Kericho Municipality 2/65 wherein the defendants had entered their defense and filed their notice of preliminary objection.
 8. That the dispute had emanated from a transaction dated June 27, 2020 whereby the defendants lacked the capacity to dispose of the suit land that belonged to the plaintiff, in a transaction that had not been sanctioned by a majority membership, as required by law. That even after the transaction, the consideration for the sale had not been paid into the plaintiff's account domiciled in Co-operative Bank but into individual bank accounts of the 2nd -6th defendants.
 9. The plaintiff relied on the decision in the case of *Suzanne Achieng Butler & 4 others vs Redbill Height Investments Limited & another* [2016] eKLR to submit that since the course of action and/or transaction arose from predominantly the sale of land, the jurisdiction over the matter lay with the Environment and Land Court and not the Co-operative Societies Tribunal.
 10. That notably, section 81 of the *Co-operative Societies Act* provided that a dispute before the corporative tribunal could escalate to the High Court as the final appellate court. That the matter, being a land matter could therefore not be heard and determined by the High Court in its appellate jurisdiction.
 11. That section 11(sic) of the *Environment and Land Court Act* established the jurisdiction of the court in accordance with article 162(2) of the *Constitution*, with power to hear and determine the disputes therein. That the matter before the court related majorly on the occupation of the parcel of land sold to the 1st defendant and since the dispute related to ownership, occupation, use and disposal of the suit land, then the Environment and Land Court had competent jurisdiction to determine the matter.
 12. The plaintiff further relied on the provision of section 76 of the *Co-operative Societies Act* to submit that the dispute that formed the subject matter of the suit did not fall within any of the disputes



therein listed. That the Co-operative Tribunal had no jurisdiction to determine ownership of land. The plaintiff thus sought for the preliminary objection to be dismissed with costs.

Determination

13. I have considered the arguments here in on the preliminary objection raised by the parties as well as the authorities cited therein. I find the issue arising for determination therein being whether the preliminary objection is sustainable. Applying the principles in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 to wit that an objection must consists of a point of law which if argued as a preliminary objection is capable of disposing of the suit, it must be remembered that a preliminary objection, correctly understood, is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.
14. The defendants herein have argued that the plaintiff cannot bring a suit against them in the Environment and Land Court because it does not have jurisdiction. Jurisdiction is a primary point of law and is therefore within the first principle in the *Mukisa Biscuit* case as it is a point of law capable of disposing this suit.
15. It is therefore the defendants' submission that pursuant to the provisions of section 76 of the [Co-operative Societies Act](#), any dispute between the co-operative society and its members including past members, for any debt or demand due to it, ought to be referred to the tribunal established under the [Co-operative Societies Act](#). That the plaintiff, being a co-operative society, ought to have referred this matter to the tribunal, which was clothed with jurisdiction, to be heard and determined therein, but not the court.
16. The plaintiff on the other hand has argued that the course of action and/or transaction arose from predominantly the sale of land, by the 2nd -6th defendants, to the 1st defendant and since the dispute relates to ownership, occupation, use and disposal of the suit land, the jurisdiction over the matter lay with the Environment and Land court and not the Co-operative Societies Tribunal which had no jurisdiction to determine issues affecting the ownership of land.
17. Section 76 of the [Co-operative Societies Act](#) provides as follows;
 - "(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."

18. The provisions of section 76(1) of the *Co-operative Societies Act* do not contemplate a scenario where the Co-operative Tribunal can determine issues affecting the ownership to land even if they were between members present, past, deceased, society, committee or officials of Society.

19. Parliament enacted the *Environment and Land Court Act* and set out in details, the jurisdiction of the court. Section 13 of the *Environment and Land Court Act* outlines the jurisdiction of the court 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 interest in land; and
 - e) any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under articles 42, 69 and 70 of the Constitution.
- 4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court
- 5) Deleted by Act No 12 of 2012
- 6) Deleted by Act No 12 of 2012
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
 - a) interim or permanent preservation orders including injunctions;
 - b) prerogative orders;



- c) award of damages;
- d) compensation;
- e) specific performance;
- f) restitution; or
- g) declaration; or
- h) costs"

20. From the above captioned, it is clear that the Environment and Land Court, which is the court contemplated under article 162(2)(b) of the Constitution, has a broad constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land.
21. I have considered the orders sought by the plaintiff in its plaint and there is no doubt that it seeks the recovery of land and/or ownership to LR No Kericho Municipality 2/65 by questioning the 2nd-5th defendants' legal capacity in the agreement for sale and transfer of the suit land to the 1st defendant.
22. The operating and/or controlling phrase under section 76(1) of the Co-operative Societies Act is "business of the society" which to my knowledge is not only confined to the internal management of the society but covers every activity of the society within the ambit of its by-laws and rules, for example disputes between members of the society and the Board of Director, actions such as when the elections should be conducted, how they should be conducted and whether persons so elected were validly elected, whether they are legitimate office bearers of a management committee, meetings, amendment of by-laws, qualification of membership, and expulsion of members. Indeed this aspect was well reasoned in the case of *Gatanga Coffee Growers Cooperative Society v Gitau* (1970) EA 361 where Simpson J held as follows:-
- "Business of the Society" is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by-laws and rules"
23. In *Republic vs Matheka Kithome & 4 others* [2011] eKLR, the court described the business of the Society as follows:
- "In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being "the promotion of the welfare and economic interests of its members." It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service or operations) for which the cooperative society is established as to be part of its activities or operations as guided by co-operatives law, by-laws and rules. Such dispute must be referred to the Cooperatives Tribunal which under section 77 of the Act is required to be composed of a majority (4 of 7 members) of persons with experience in cooperative law and cooperative management and practice."
24. Clearly issues regarding the recovery of land are not included as activities of the business of the society. Indeed the enactment of article 162(2) of the Constitution and the creation of the Environment and Land Court superseded section 76 of the Co-operative Societies Act in as far as the determination of



matters relating to ownership of land were concerned. For the above reasons, the preliminary objection herein has no merit and the same is dismissed with costs to the respondent/plaintiff.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 3RD DAY OF NOVEMBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

