



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 5 OF 2020

JOSEPH KAHUGA NDERITU1ST PLAINTIFF

MICHAEL MUIRURI MWAURA.....2ND PLAINTIFF

JACKLINE WANJIRU MWANGLI.....3RD PLAINTIFF

JACKSON MWAI WAMBUGU.....4TH PLAINTIFF

JAMES WANJOHI GATERU (Suing on their behalf and on behalf of

the PANORAMA GARDENS RESIDENTS

ASSOCIATION)5TH PLAINTIFF

VERSUS

URITHI HOUSING CO-OPERATIVE

SOCIETY LIMITED1ST DEFENDANT

FAMILY BANK LIMITED2ND DEFENDANT

RULING

1. The Plaintiffs filed suit against the Defendants on the 14/5/2020 claiming interalia specific performance, declaration of trust, extension of time within which the consent of the Land Control Board Act may be obtained and the urged that an escrow account be opened to secure further payments of the pending purchase price, restitution of the purchase price together with interest.
2. Simultaneously, the Plaintiffs filed a notice of Motion dated the 14/5/2020 seeking interalia a temporary injunction preventing the Defendants from disposing the suit property pending the hearing and determination of the suit.
3. The 1st Defendant in response filed a Preliminary Objection on the 1/12/2020 on grounds that;
 - a. The court lacks jurisdiction to hear and determine the matter.
 - b. The dispute herein is between the members of the 1st Defendant and its members in respect to the business of the cooperative society pursuant to Section 76 of the Cooperative Societies Act.
 - c. The suit is a clear abuse of the process of the court.
4. The Plaintiffs and the 1st Defendant elected to canvass the Preliminary Objection by way of written submissions on the Preliminary Objection which I have read and considered.
5. The 2nd Defendant did not oppose the Preliminary objection.
6. A Preliminary Objection must be on a pure point of law. It helps if the point of law is precisely, briefly and clearly defined in the notice of preliminary objection. In the case of Mukisa **Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the locus

classicus on Preliminary Objections in this region, Law JA stated:

“So far as I’m aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

7. Still in the same case, Sir Charles Newbold JA, stated:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had 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 issue. The improper practice should stop.”

8. It is the 1st Defendants position that the court does not have jurisdiction to hear the matter on account that it is a dispute between a cooperative and its members under section 76 of the cooperative societies Act.

9. Section 76 of the Cooperative Societies Act provides as follows;

“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.

10 A dispute for the purpose of the Act is further defined as follows;

“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

11. It is not in dispute that the Plaintiffs acquired certain properties from the 1st Defendant. That it was part of the purchase that the purchasers would acquire membership in the 1st Defendant. I have seen copies of the exhibited certificates of ownership which bear the membership certificate numbers to denote that other than being a purchaser the Plaintiffs acquired or where expected to acquire membership of the 1st Defendant.

12. I have also carefully perused the pleadings and it is clear that the cause of action arises from a contractual transaction between the Plaintiffs and the 1st Defendant which was triggered by the act or desire of the 2nd Defendant to exercise its statutory power of sale with respect of the suit land which is alleged to have been sold to the Plaintiffs at various times by the 1st Defendant.

13. Proceeding from section 76(2) above it is manifestly clear that the cause of action in this particular suit does not fall within the definition set therein on account that the Plaintiffs have not sought any claim with respect to a debt but specific performance among other remedies pursuant to an alleged purchaser’s interest.

14. In addition, the parties in this case are not limited to a cooperative society and its members but a third party namely the 2nd Defendant which is licenced to carry out banking business thus outside the purview of the definition of parties to a dispute as defined under Section 76 (1) of the Cooperative Societies Act.

15. To the extent that the Court in determining the Preliminary Objection is being invited to investigate the cause of action of the parties *vis a vis* the period when the property in dispute was charged to the 2nd Defendant, the Preliminary Objection ceases to be a pure point of law. Further to the extent that the court would have to decipher whether the remedies sought in the dispute are such as the Cooperative Tribunal would have power to grant, also diminishes the question from being a pure point of law.

16. From the pleadings it is not clear without the need for further investigation/ inquiry by the court on whether the claim of the Plaintiffs can be separated from that of the bank and the cooperative society. Other matters that may require investigation is whether the breach of contract between the bank and the cooperative if enforced in the manner the bank wants to, would affect the Plaintiff and if the Plaintiffs are affected

in what way.

17. There being a heavy cloud over the nature of the dispute which is best left for the trial court, the Preliminary Objection in my considered view fails. It is dismissed.

18. Costs shall be borne by the 1st Defendant in favour of the Plaintiffs.

19. It is so ordered.

DATED, SIGNED & DELIVERED ONLINE THIS 26th DAY OF MAY, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Senaji for the 1st – 5th Plaintiffs/Applicants

Ms Gitau for the Defendant/Respondent

Ms Ngui Wangu for the 2nd Defendant/Respondent

Court Assistants: Kuiyaki/Alex