REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL CASE NO. 17 OF 2016

INOI FARMERS CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

KAITHERI HOUSING CO-OPERATIVE SOCIETY LTD.....RESPONDENT

(*Being an appeal from the Judgment and Decree of the Co-operative Tribunal*

at Nairobi in CTC No. 10 of 2011 delivered on 18th October 2016)

JUDGMENT

Summary of Facts

Vide a statement of claim dated 28th October 2010, the Claimant (now Respondent) approached the Co-operative Tribunal seeking orders:

> ***a) For a permanent injunction barring the Defendants (now Appellants) from interfering with Land Parcel No. Inoi/Kerugoya/252, 688 and 689 and further from interfering with the management of the Claimants;***
>
> ***b) Costs and interest thereon.***

In response, the Respondent (now Appellant) filed a statement of defence and a counterclaim which was amended vide leave granted on 2nd December 2015. The amended counterclaim imputed fraud on the Claimant's acquisition of Land Parcel No. Inoi/Kerugoya/252, 688 and 689 (hereinafter referred to as the Suit Properties, and in addition, sought the following orders:

> *a. That a permanent injunction be issued against the Claimant (now Respondents) restraining it through itself, its servants and/or employees from transferring, selling, disposing, wasting, alternating and leasing, changing and or subdividing Land Parcels No. Inoi/Kerugoya/ 252 (now, Parcel Nos. Inoi/Kerugoya/3096, 3097, 3098, 3099) and 3100 (further subdivided into Inoi/Kerugoya/3126-3160) as well as Land Parcels No. Inoi/Kerugoya/ 688 and 689.*
>
> *b. Cancellation of Title Deeds in respect ofLand Parcels No. Inoi/Kerugoya/ 252 (now, Parcel Nos. Inoi/Kerugoya/3096, 3097, 3098, 3099) and 3100 (further subdivided into Inoi/Kerugoya/3126-3160) as well as Land Parcels No. Inoi/Kerugoya/ 688 and 689 from the names of the Claimant's society and registration of the same in the names of the Respondent society.*

On the 3rd of June 2015, the Claimant (now Respondent) withdrew their suit in its entirety. The Tribunal was thus called upon to make a determination on the defence and counterclaim lodged by the Respondent (now Appellant) and the Claimant's (now Respondent's) response thereto.

The Tribunal heard the matter and rendered its judgement on 18th October 2016 in favour of the then Claimant (now Respondent). The Tribunal found that the Respondent (now Appellant) had failed to prove that the transfer of the Suit Properties was marred by fraud and illegality.

Issues for Determination

Aggrieved by the judgement of the Tribunal, the Appellant herein mounted the present appeal, lodging its Memorandum of Appeal on 17th November 2016. The Appellant set out seven grounds of appeal as follows:

1. That the learned Magistrate erred in law and fact by not appreciating and applying the provisions of the Co-operative Society Act, to wit, Section 27 and 28 while determining the counterclaim;

2. The learned Magistrate erred in law and fact by not finding that the Respondent had no viable defence to the Appellant's counterclaim;

3. The learned Magistrate erred in law and fact by not finding that fraud had been proved, as there was no Annual General Meeting by the Appellants resolving to transfer original Land Parcel Nos. Inoi/Kerugoya/252, 688 and 689 to the Respondent society;

4. The learned Magistrate erred in law and fact by not finding that the Respondent society witnesses had admitted that there was no Annual General Meeting of the Appellant's society sanctioning transfer of the suit properties to the Respondent society;

5. The learned Magistrate erred in law and fact by not finding that the alleged transfer of the suit properties to the Respondent society contravened the Land Control Act, and was therefore null and void ab initio;

6. The learned Magistrate erred in law and fact by failing to find that the alleged sale of the suit properties to the Respondent society was null and void for want of consideration;

7. The learned Magistrate erred in law and fact by failing to find that the alleged sale of the suit properties contravened the by-laws of the Appellant society;

8. The learned Magistrate erred in law and fact by failing to find that the Respondent's evidence before him was full of contradictions and inconsistencies;

9. The learned Magistrate erred in law and fact by finding that the minutes of the Appellant and Respondent joint management committee meeting held in 1991 resolved transfer of the suit properties from the Appellant to the Respondent;

10. The learned Magistrate erred in law and fact by finding that the Appellant had not proved fraud on the part of the Respondent in the transfer of the suit properties;

11. The learned Magistrate erred in law and fact by not finding that the Appellant only found out about the fraudulent transfer in 2011 as the two societies were sister companies having the same membership across the board and that the Appellant society continued to run a coffee factory in the original Land Parcel No. Inoi/Kerugoya/252 hence the perpetrated fraud could not be suspected;

12. The learned Magistrate erred in law and fact by making contradicting findings in his judgement thereby showing outright bias.

The Appellant thus prays for the appeal to be allowed, for the Tribunal decision to be set aside and for costs of the appeal.

Appellant and Respondent's Submissions

The Appellant filed its submissions on 02nd December 2020. It contested that the dispute revolved around the ownership of original Land Parcels No. Inoi/Kerugoya/ 252 (now, Parcel Nos. Inoi/Kerugoya/3096, 3097, 3098, 3099) and 3100 (further subdivided into Inoi/Kerugoya/3126-3160) as well as Land Parcels No. Inoi/Kerugoya/688 and 689. That the Suit Properties originally belonged to the Appellant society but were transferred to the Respondent society. It is the manner in which the said transfer was executed that aggrieved the Appellant. It is the Appellant's submissions that the transfers were discussed by a joint meeting of the management committee of both societies, first on 4th June 1991 and later on 19th February 1992. That it was consequent to these discussions that a decision was reached to transfer the land to the Respondent society. The Appellant faults the transfer process on two grounds: First, because in accordance with **Sections 27 and 28 of the Co-operative Society Act**, decisions involving the transfer of land require to be voted upon by the members of the society at a duly convened AGM, and a resolution thereon passed. The Appellant contends that this was not done. Secondly, it is unclear from the Respondent's testimony whether the transfer was by way of gift or by way of a consideration of Ksh. 1,965,090. Either way, the Appellant submits that there was no sale agreement signed evidencing the transaction. It is the Appellant's case therefore that the Tribunal failed to appreciate the centrality of an AGM resolution to the transaction process and thereby arrived at the wrong conclusion.

The Respondent filed its submissions on 10th December 2020. The Respondent insists that there was no fraud clouding the transfer of the Suit Properties to itself. That the burden of proof lay with the Appellant to prove that the necessary AGM meetings were not conducted. The Respondent further submitted that the by-laws referred to by the Appellant were enacted in 1997, long after the transfer of the Suit Properties. On the question of fraud, it is the Respondent's submission that the Appellant had failed to meet the requisite evidentiary threshold. Reliance is placed on the decision in **Central Bank of Kenya Vs Trust Bank Ltd & 4 Others Nairobi Civil Appeal No. 215 of 1991** and **Rosemary Wanjiku Muriithi Vs George Maina Ndinwa Nyeri Civil Appeal No. 9 of 2018.** The Respondent further submitted that the transfer was effected by way of a gift, being that the membership of the Respondent society was at the time of transfer the same as that of the Appellant's. It is the Respondent's further contention that the Suit Properties were transferred in the years 1994 and 1997 and that the Appellant's counterclaim was lodged in 2011, demonstrating that the counterclaim was merely an afterthought. The Appellant thus urged the court to dismiss the appeal with costs to the Respondent.

Legal analysis and Opinion

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal.

In ***Selle Vs Associated Motor Boat Co. [1968] EA 123,*** the legal parameters and considerations for guiding a court of first appeal were set out as follows:

> *"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

Further guidance is given by the Court of Appeal decision *in* ***Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278*** *:*

> *"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."*

From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the Tribunal, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the Tribunal had the advantage of seeing and hearing the Parties.

Now, to the substance of the Appeal. The court has anxiously considered the Memorandum of Appeal and the parties' rival submissions in its analysis and determination of the matter.

From the outset, there is no disputation that the Suit Properties originally belonged to the Appellant society. From the copies of title deed provided, it is evident that Title to Land Parcel Inoi/Kerugoya/252 was issued to the Appellant society on 1st December 1966; Title to Land Parcel Inoi/Kerugoya/688 issued on 10th August 1989 and Title to Land Parcel Inoi/Kerugoya/689 issued on 9th of November 1987. There is consensus on the fact that the Appellant society originally carried on the business of production and marketing of coffee on behalf of its members. That later on, the society ventured into the housing business and was advised by the regulator that there was a need to form a separate society to own and manage the real estate business. Based on this advice, the Respondent housing society was registered. A meeting was held in 1991 in which members resolved to transfer the Suit Properties to the Respondent. The Respondent avers that this meeting was an AGM, while the Appellant contends that it was a meeting of the management committees of both societies. That notwithstanding, it is not contended that the Suit Properties were transferred to the Respondent society. The transfer of Land Parcel Inoi/Kerugoya/688 was registered on 11th January 1994, and the Title Deed thereto issued on 12th January 1994. The transfer of Land Parcel Inoi/Kerugoya/689 was similarly registered on 11th January 1994, and the Title Deed thereto issued on 12th January 1994. The transfer of Land Parcel Inoi/Kerugoya/252 was registered on 12th February 1997 and a title issued on the same date.

The Appellant's case is essentially one of recovery of land. The Appellant' s case is that the failure of the transfer transaction to accord with the provisions of ***Section 27 and 28 of the Co-operative Societies Act,*** renders the transaction void in law and therefore prays for the respective Title Deeds in the Respondent's name to be cancelled and the Suit Properties to be reverted to the Appellant's proprietorship. As already observed, the transfers were registered in 1994 and 1997. The Appellant's counterclaim was first lodged in 2011 and amended in 2015. In essence the case for recovery of land was brought after 17 years with respect Land Parcel Inoi/Kerugoya/688 and 689 and after 14 years with respect to Land Parcel Inoi/Kerugoya/252. The Tribunal and the Respondent have already pointed out that it is about 30 years since the impugned transaction. This Court finds that the appropriate dates to be taken into account are the registration dates and the date of filing of the counterclaim as above. With the withdrawal of the Plaint, the Respondent became the Plaintiff with regards to the counterclaim.

Now, ***Section 7 of the Limitation of Actions Act, Cap 22*** bars a party from bringing an action for recovery of land after the lapse of 12 years. The Section is reproduced hereunder:

> *'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it firstaccrued to some person through whom he claims, to that person.'*

In ***Mehta Vs Shah [1965] E.A 321,*** rationale for the above provision was explained as follows:

> *"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."*

In ***Gathoni Vs Kenya Co-operative Creameries Ltd, [1982] KLR 104,*** the Court of Appeal stated thus:

> *"…The Law of Limitation of Actions is intended to protect defendants against unreasonable delay in the brining of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."*

The Appellant has submitted to the court that it did not know of the alleged fraud until the year 2011. Indeed, ***Section 26 of the Law of Limitations Act, Cap 22*** allows for extension of time in the case of fraud. The Section reads as follows:

> ***'Where, in the case of an action for which a period of limitation is prescribed, either —***
>
> *(a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or*
>
> *(b) The right of action is concealed by the fraud of any such person aforesaid; or*
>
> *(c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered thefraud or the mistake or could with reasonable diligence have discovered it.'*

The present suit however is not brought by a section of the members of the society; It is brought by the Appellant as a juristic person vested with the power to sue and be sued in its name. See ***Section 12 of the Co-operative Societies Act, No. 12 of 1997***. Being that the Appellant was the transferor in the transaction, it cannot be said that the Appellant society was unaware of the transaction.

The upshot of the above analysis therefore is that the suit and the resultant appeal are statute barred and cannot be entertained. It is my view that the appeal therefore fails and that costs ought to be awarded to the Respondent. It is so ordered.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wangechi Munene for Appellant

2. Ndana for Respondent

3. Kabuta – Court clerk.