



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 52 OF 2019

STEPHEN KYAMBI WAMBUA.....1ST APPELLANT

ROSE KALONDU.....2ND APPELLANT

VERSUS

MAGDALENE KATILE MAINGI.....1ST RESPONDENT

PETER MUTANGILE.....2ND RESPONDENT

(Being an Appeal from the Ruling of Senior Principal

Magistrate's Court at Kangundo in ELC Case No. 2 of 2019 d

elivered on 1st October, 2019 by Hon. M. Opanga -Snr. Resident Magistrate)

JUDGMENT

1. The Appellants are challenging the Ruling of the trial court which was in respect to the Respondents' Notice of Motion dated 19th March, 2019 and the Appellants' Notice of Preliminary Objection dated 10th April, 2019.

2. In the Notice of Motion dated 19th March, 2018, the Respondents sought for injunctive orders pending the hearing and determination of the suit. In the Notice of Preliminary Objection, the Appellants challenged the jurisdiction of the trial court. The learned Magistrate allowed the Respondents' Notice of Motion and dismissed the Notice of Preliminary Objection.

3. Being dissatisfied with the orders of the trial Magistrate, the Appellants averred in the Memorandum of Appeal as follows:

a. That the learned trial Magistrate erred in law and in fact in failing to consider that the court lacked jurisdiction to entertain the matter as the dispute brought in Court lay squarely before the Co-operative Tribunal as per Section 76 1(a) of the Co-operative Societies Act.

b. That the learned trial Magistrate erred in law and in facts in failing to consider that the dispute brought before Court concerned the business of a Society thus the want of jurisdiction.

c. That the learned trial Magistrate erred in law and in fact in failing to consider that the Co-operative Tribunal had jurisdiction to hear disputes involving land.

d. That the learned trial Magistrate erred in law and in fact in failing to consider that the Supplementary Affidavit introduced new evidence, evidence which can only be proved in the substantive suit and enjoining the said party in the suit.

e. That the learned trial Magistrate erred in law and in fact in failing to consider that one Mutua Mutuku who allegedly got Share No. 1751 from Emma Nzisa Muindi could not legally obtain the said share minus petitioning for Letters of Administration of the Estate of John Muindi (deceased).

4. The Appeal proceeded by way of written submissions. The Appellants' advocate submitted that from the pleadings, the Respondents' interests are through Mutuku Mutua who is an alleged member number 1751 and that the business of Muka Mukuu Co-operative Society is to sell land to its members.

5. The Appellants' counsel submitted that it is undisputed that there exists a dispute between the Appellants and the Respondents involving share number 1751 from plot number Citrus 49 Central Farm.
6. According to counsel, any dispute concerning the business of a Co-operative Society should be heard by the Co-operative Tribunal pursuant to the provisions of Section 76(1) (a) of the Co-operative Society Act. Counsel relied on the cases of **Bingwa Sacco Society Limited vs. Quickline Auctioneers & Joseph Githara Muchira (1970) EA 361**, amongst others.
7. On the second issue, the Appellants' advocate submitted that the Respondents did not establish a *prima facie* case to warrant the issue of the orders for injunction and that the owner of share number 1751 from where the Respondents' claim arises was John Mundi (*deceased*) who transferred the same to her daughter before his death.
8. It was submitted that Mutuku Mutua could not be said to have bought share number 1751 from Emma Nzisa Muindi because John Muindi had already passed on; that the case involving share number 1751 and plot number 210 is a subject of investigations by the DCIO and that the Respondents were allocated plot number 45 from share number 1928.
9. Counsel submitted that it is strange that besides the existence of the original map of the Society, another one was drawn later which interchanged plot number 45 and 49; that the Appellants protested about the said changes to the Society and that as at the time of filing the suit, it is the Appellants who were in possession of the suit property.
10. The Appellants' counsel finally submitted that the Respondents' Supplementary Affidavit should be treated with suspicion having introduced fresh facts which were not in the initial Application.
11. On her part, the Respondents' advocate submitted that the Respondents are not members of the Co-operative Society; that the 1st Defendant is also not a member of the Society and that the Respondents have sued the 1st Appellant seeking for a refund of the purchase price for selling them non-existent plots.
12. The Respondents being non-members, it was submitted, they could not have lodged their claim before the Co-operative Tribunal. Counsel relied on the cases of **Redemptor Syombua Musyoki & Another vs. Ngii Ndambuki and Another (2017) eKLR** and **Joyce Muthoki Muoki vs. John Muoki Ngui & Others (2018) eKLR**.
13. On the second issue, it was submitted that the Appellants did not produce any evidence to show that the suit land belongs to them; that the Respondents have been in possession of the land since the year 2000 and that the Society confirmed in its letter dated 17th March, 2018 that they were allocated the land.
14. The first issue I will deal with is whether the trial court had jurisdiction to deal with the dispute. While dealing with this issue, the learned Magistrate held as follows:

“In the present suit the Plaintiffs/Applicants are not current or past members of the Co-operative Society, the same goes for the 1st Defendant. Only the 2nd Defendant is a member of the Co-operative Society. The prayers sought by the Plaintiffs also do not fall within the description of disputes described in Section 76(2) of the Co-operative Societies Act. I would therefore find that this court is properly ceased of the jurisdiction to determine the Plaintiffs' suits.”

15. Section 76(1) and (2) of the Co-operative Society 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 licence or any other due, from the Authority.”*

16. This court has since held that the definition of “a dispute” under Section 76(2) of the Act does not include disputes relating to the use and occupation of, and title to land. In the case of **Toratio Nyang'au & 4 Others, (2011) eKLR**, Maraga J. (*as he was then*) held as follows:

“...Although we are not told what the Respondent was established to do, I am however certain that resolving its land disputes with

third parties whether or not they are its members cannot have been one of the business of the Respondent's Society. In the circumstances the land ownership dispute in this case did to fall within the purview of Section 76 of the Co-operative Societies Act and the Tribunal had, therefore, no jurisdiction to entertain the matter."

17. Indeed, the above holding is informed by the definition of the word "dispute" under Section 76(2) of the Act. The "disputes" contemplated under that Section, and which falls within the purview of the Tribunal, are claims involving "debt or demand due" and claims for "refusal to grant or revoke a licence." Any claim in respect to land even amongst members of the Society, whether present or past, can only be handled by the Magistrates gazetted to hear land matters or the Environment and Land Court.

18. In any event, there is no evidence to show that the Respondents are past or present member of Muka Mukuu Co-operative Society, or that they are pursuing their claim through members, past members or deceased members to bring them under the ambit of Section 76 of the Co-operative Society Act.

19. The Respondents' claim is that having bought plot number 46 from the 1st Appellant, they received a demand letter from the Co-operative Society on the ground that the land belonged to the Society. That being so, the learned Magistrate was entitled to hold that the court had jurisdiction to hear and determine the dispute.

20. The issue of whether the learned Magistrate was right or wrong in allowing the Application for injunction can be deciphered from the pleadings. It is trite that the grant of an injunction is a discretionary, which discretion has to be exercised judiciously. In the case of **Mbogo vs. Shah (1968) EA 93**, it was stated that an appellate court should not interfere with the exercise of the discretion of the trial court, unless it is satisfied that the trial court in exercising his/her discretion has misdirected himself/herself in some manner and as a result has arrived at a wrong decision.

21. In the Notice of Motion dated 19th March, 2019, the Respondents pleaded that they are the owners of plot number 49 Central Farm Situate at Muka Mukuu Co-operative Society (*the suit property*). The Respondents annexed on their Affidavit a letter dated 17th March, 2018 by the Society confirming that the allocation of the plot to the Respondents had been approved.

22. The Respondents also annexed on their Supporting Affidavit the Agreement that they entered into with Mutuku Mutua dated 1st September, 2015 in respect of the suit property. According to the Respondents, they developed the suit property and took actual possession of the same. The Respondents annexed on their Affidavit photographs showing the permanent structures that they have put up on the suit properties.

23. In his Affidavit in response to the Application, the 2nd Appellant deponed that Mutua Mutuku, who allegedly sold share number 1751 to the Respondents, is a fraudster.

24. The documents that were placed before the trial court showed that indeed the Respondents purchased the suit land, which purchase was acknowledged by the Society. Whether the said purchase was fraudulent or not can only be ascertained at trial. Indeed, it is on the basis of the documents that the Respondents annexed on the Affidavit that the learned Magistrate, correctly so, arrived at this holding:

"As per the annexures in support of their Application the Plaintiffs/Applicants have demonstrated that the plot in dispute was allocated to them as of now they seem to have a prima facie case with a probability of success..."

25. The learned Magistrate was convinced based on the evidence that was placed before her that it was the Respondents who were in possession of the suit property and that the Appellants were in the process of digging a foundation on the same land. That being the case, the learned Magistrate was entitled to arrive at a conclusion that the "actions complained of are likely to occasion irreparable loss, thus the need to preserve the suit property until the matter is heard and determined."

26. The Appellants should have the matter fixed for hearing, to enable the court determine if indeed the Respondents acquired the suit property fraudulently or not. Before that, the Respondents should continue being in possession of the suit property as directed by the learned Magistrate.

27. Having found that the learned Magistrate exercised her discretion to grant the order of injunction on sound grounds, I shall, which I hereby do, dismiss the Appeal with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

O. A. ANGOTE

JUDGE