



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC APPEAL NO.19 OF 2020**

**PETER WANJOHI**

**OFFICIAL LIQUIDATOR DRUMVALLE**

**FARMERS CO-OPERATIVE SOCIETY LIMITED.....APPELLANT**

**VERSUS**

**PIUS MUSIMBA MUASYA.....1<sup>ST</sup> RESPONDENT**

**NORMAN MUTUA KIMATU.....2<sup>ND</sup> RESPONDENT**

**JOHN NZOMO KIOKO.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Co-operative Tribunal delivered on 21<sup>st</sup> May, 2020 in Tribunal Case No.720 of 2016)*

**JUDGEMENT**

1. This appeal arises out of the ruling and orders of the Co-operative Tribunal delivered on 21<sup>st</sup> May 2020 in the Tribunal Case No 720 of 2016.

The honourable Chairperson made the following orders:-

***“(a) That the application is allowed in terms of prayers 3 and 4 and;***

***(b) That enforcement of prayer 3 to take effect upon lifting of the freeze of execution of decrees and orders made before 15<sup>th</sup> March 2020”.***

2. The Appellant being dissatisfied with the said ruling, filed an appeal dated 27<sup>th</sup> May 2020 to this court on the following grounds: -

***(a) That the learned trial Tribunal erred in law and in fact and broke the law when they proceeded to hear and determine the Respondent’s application dated 17<sup>th</sup> September,2019 when the same issues involving the same parties are pending for hearing and determination before the Court of Appeal in Civil Appeal No.125 of 2019.***

***(b) That the learned Tribunal erred in law and in fact and was fundamentally wrong to preside over and determine issues which had been raised and determined by the same Tribunal hence the same should have been struck out in limine for being vexatious, res judicata and an abuse of the due process of law.***

***(c) That the learned tribunal erred in law and in fact and failed to find that the Respondents illegally and without any lawful authority proceeded to convene a meeting on the 13<sup>th</sup> Day of October 2018 purporting to act for the Appellant and fraudulently subdivided and transferred Title No. Nairobi block 118/1132 which belongs to a third party and which matter is now pending investigations by the Director of criminal investigations on account of fraud.***

***(d) That the learned trial tribunal erred in law and in fact and failed totally to make a finding that Pius Masimba Muasya, Norman Mutua Kimatu and John Nzomo Kioko had no locus to institute these proceedings as they relinquished their interests in the subject matter and they are not members of Drumvale Farmers Co-operative Society Limited (in liquidation).***

***(e) That the learned trial Tribunal was wrong and it erred in law and in fact and failed totally to make a finding of fact that the liquidation process was 90% complete and the Appellant’s assets have been transferred to members and 3<sup>rd</sup> parties who are not***

*parties to the current proceedings and that any claim ought to have been brought to the attention of the liquidator and on 22<sup>nd</sup> January 2010 vide Gazette notice No.963 the liquidator dutifully notified all the Society's shareholders and creditors that 30<sup>th</sup> April 2010 was to be a final day to admit any claim from the said shareholders and creditors.*

*(f) That the learned trial Tribunal was biased and manifestly so in failing to appreciate that on 18<sup>th</sup> January 2020 the majority of members of Drumvale farmers Co-operative Society Limited resolved to withdraw all claims against Peter Wanjohi the official liquidator in the Co-operative Tribunal at Nairobi Cause No.720 of 2016.*

3. REASONS WHEREFORE; the Appellant prays for judgment against the entire Ruling of the Co-operative Tribunal dated 21<sup>st</sup> May 2020 as follows:-.

*(i) The ruling of the Co-operative Tribunal dated 21<sup>st</sup> May 2020 in Tribunal cause no.720 of 2016 be set aside.*

*(ii) The Cooperative Tribunal be ordered to proceed to hear and conclude the Tribunal Cause No.720 of 2016 now awaiting defence hearing on merit.*

*(iii) The status quo be maintained pending hearing and determination of the Tribunal Cause No.720 of 2016 on merit.*

4. Together with the Memorandum of Appeal the Appellant filed a notice of motion dated 27<sup>th</sup> May 2020. The court considered the same and granted prayer number 2 in the Notice of Motion. The orders granted by this court on 19<sup>th</sup> November 2020 were:-

*"1. That pending the hearing and determination of the Appeal herein, the orders made by the Cooperative Tribunal in Tribunal Cause No 720 of 2016 dated 21<sup>st</sup> May 2020 be and are hereby suspended forthwith....."*

5. In opposition, the Respondents filed a replying affidavit sworn by the 1<sup>st</sup> Respondent on 22<sup>nd</sup> March 2021. He deponed that the order in issue was issued on 21<sup>st</sup> May 2020 by the Cooperative Tribunal directing the Applicant to render a true account of the liquidation work he has done in the society as per his letter of appointment. He annexed the said orders and deponed further that the Appellant rushed to this court in a bid to frustrate the orders of Tribunal and the effort of the members to get a report on the liquidation involving millions of shillings in terms of bank balances and several plots and parcels of land that he has illegally and unlawfully sold.

6. He also deponed that the Appellant had previously filed an appeal **No. ELC Appeal 12 of 2017** in a bid to also frustrate the Tribunal's ruling issued on 24<sup>th</sup> November 2016 which appeal was dismissed on 19<sup>th</sup> September 2018. He annexed the said Judgement dated 19<sup>th</sup> September 2018.

7. He deponed that despite the Tribunal's orders, the Appellant has continued to dispose the Society's properties with impunity and without following due process and procedures provided in the Co-operative Societies Act. He deponed further that the Appellant has also advertised for sale of the society's property under liquidation prompting the Respondent to file an application for contempt against the Appellant before the Tribunal and the tribunal issued a notice to show cause against the Appellant. He annexed the Tribunal's orders dated 4<sup>th</sup> November 2020. He deponed that the Applicant filed this Appeal to conceal his continued impunity, contempt of court orders and disregard of the law.

8. On the 23<sup>rd</sup> March 2021, the court with the consent of parties directed that the Appeal be canvassed by way of written submissions.

#### **The Appellant's Submissions**

9. They are dated 26<sup>th</sup> May 2021. Counsel for the Appellant submitted that the Respondents have no legal mandate to act on behalf of Drumvale Farmers Co-operative Society Limited since on 25<sup>th</sup> September 2009, the Appellant was gazetted under Section 62 1 (b) of the Co-operative Societies Act and empowered by the Commissioner for Co-operative Development to be a liquidator of Drumvale Farmers Co-operative Society.

10. He submitted further that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents lacked locus and sufficient interest to institute the proceedings. It was his submission that the 1<sup>st</sup> Respondent transferred his share No.1388 and Land **Parcel No. Mavoko Town Block 15/523** to Mr. Paul Ronald Ndwiye Thige on 24<sup>th</sup> April 1994 and that the 2<sup>nd</sup> Respondents shares in **Nairobi/Block 118/430** was transferred to Shineria Mukwa Ndiga Murungi on 5<sup>th</sup> March 1995 while the 3<sup>rd</sup> Respondent's actual shares belong to Francisca Ndunge Mutunga. He added that since all the Respondents are strangers to Drumvale Farmers Co-operative Society, orders of the Tribunal issued on 21<sup>st</sup> May 2020 which were further orders to its initial orders issued on 24<sup>th</sup> November 2016 and its orders to show cause issued on 4<sup>th</sup> November 2020 are illegal as they are punitive ,oppressive and have been issued to strangers who have no locus.

11. He submitted that the same issues herein between the same parties are pending determination by the court of appeal in **Civil Appeal No. 125 of 2019**. He also submitted that the Appellant made an application in the Tribunal under Order 40 Rule 1 of the Civil Procedure Rules seeking injunctive orders against the Respondents from holding out as officials of Drumvale Co-operative Societies Limited (in liquidation) convening meetings, making resolutions, selling, leasing, subdividing, transferring or dealing in any manner whatsoever with properties belonging to Drumvale Farmers Co-operative Society limited (in liquidation) as well as orders allowing the officer commanding Kamulu Police Station to be ordered to supervise the orders of the court and on 11<sup>th</sup> April 2019, the Tribunal directed that status quo would be maintained until further directions in the matter thus the Tribunal erred by avoiding to refer to its orders maintaining status quo.

12. He also submitted that the Tribunal made a fundamental error of law and fact as it failed to appreciate that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are strangers held a meeting on 13<sup>th</sup> October 2018 purporting to act for the liquidator and actually resolved and subdivided a 3<sup>rd</sup> Party's property in violation of Section 62(1)(b) of the Co-operative Societies Act.

### The Respondents' Submissions

13. They are dated 20<sup>th</sup> April 2021. Counsel for the Respondents submitted that the issues herein were canvassed by this court in **ELC Appeal No. 12 of 2017** as the issue in contention is the order directing the Appellant herein to render an account of the liquidation work done for the society thus this appeal is *res judicata*. She relied on Section 7 of the Civil Procedure Act and the decision in **Nancy Mwangi t/a Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR** and **E.T. vs Attorney General & Another (2012) eKLR**.

14. I have considered the grounds of appeal, the response, the rival submissions filed on behalf of the parties and the authorities cited.

15. It is not in dispute that the Appellant herein had earlier filed **ELC Appeal Number 12 of 2007**. The same was considered by Hon. J Eboso who rendered his judgment dated 19<sup>th</sup> September 2018. The said judgment is subject to Appeal in the Court of Appeal being **Civil Appeal No 125 of 2019**.

16. I have gone through the grounds of appeal in **ELC Appeal No 12 of 2017**. I find that most of them have been raised again in the present appeal. Grounds Nos d, e, f and g in the previous appeal appear to have been raised in the instant appeal set out as grounds 3, 4 and 5.

17. It appears the Appellant moved to this court after the Tribunal granted these orders on 4<sup>th</sup> November 2020;

*“That the 1<sup>st</sup> Respondent to appear in open court to show cause why he should not be committed to civil jail for disobedience of Tribunal orders”.*

18. This would make this appeal *res judicata*. Section 7 of the Civil Procedure Act provides that:-

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”.*

19. Although this appeal is coached as an appeal against the Ruling and Orders of 21<sup>st</sup> May 2020, the issues raised are similar to the issues raised in **ELC Appeal No. 12 of 2017**. The Appellant states that there is pending appeal arising from the judgment of the previous appeal being Court of Appeal **Civil Appeal No 125 of 2019**. There is however no evidence that the appeal is pending.

20. The Appellant in the instant appeal contends that the Tribunal made a final finding at the interlocutory stage. In the case of **Nancy Mwangi T/A Worthlin Marketers Vs Airtel Networks (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR**; It was stated thus:

*“Is the case res judicata? Unless it is abundantly clear, when res judicata is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction. The test in determining whether a matter is res judicata was stated in summarized in Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others (2010) eKLR, as follows that: 1) The matter in issue is identical in both suits; 2) the parties in the suit are the same; 3) sameness of the title/claim; 4) concurrence of jurisdiction; and 5) finality of the previous decision.”*

21. I agree with the 1<sup>st</sup> Respondent's submissions that the issues herein are the same as those raised in **ELC Appeal No. 12 of 2017**.

22. Similarly, in the case of **ET vs AG & Another [2012] eKLR** it was held that:-

*“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and others (2001) EA 177 the court held that; parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J, in the case of Njangu vs Wambugu and another Nairobi HCCC NO.2340 OF 1991 (unreported) where he stated, ‘if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”.*

23. As regards the 1<sup>st</sup> ground of appeal the Appellant contends that the Tribunal erred in hearing and determining the Respondents' application dated 17<sup>th</sup> September 2019 when the issues involving the same parties was pending **Civil Appeal No. 125 of 2019** and before the

Court of Appeal. As stated earlier Judgment in **ELC Appeal No. 12 of 2017** was delivered on 19<sup>th</sup> September 2018. The issue of whether there is an appeal in the Court of Appeal is neither here nor there as no material was presented to this court by the Appellant to confirm the same.

24. In respect of ground 6, I equally find that the Appellant has not placed any material before this court to confirm the fact that majority of the shareholders of Drumvale Farmers Cooperative Society had resolved to withdraw claims against him.

25. The upshot of the matter is that I find no merit in this appeal and the same is dismissed. Each party do bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 28TH DAY OF OCTOBER 2021.**

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**L. KOMINGOI**

**JUDGE**

**IN THE PRESENCE OF:-**

**MR. RANAH FOR MR. WACHAKANA FOR THE APPELLANTS**

**NO APPEARANCE FOR THE RESPONDENTS**

**STEVE - COURT ASSISTANT**