



Nanasi Housing Cooperative Society Limited & another v Njore (Civil Appeal 22 of 2020) [2023] KEHC 2257 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 22 OF 2020
JM CHIGITI, J
MARCH 2, 2023**

BETWEEN

NANASI HOUSING COOPERATIVE SOCIETY LIMITED 1ST APPELLANT

MARGARET WAIRIMU MBIRUA 2ND APPELLANT

AND

JOHN MUOHO NJORE RESPONDENT

(An appeal from the judgment of Honourable A. Ithuku, H Shidiye and R Mwambura at the Co-operative Tribunal, Nairobi in cause no. 369 of 2010 delivered on 10th August, 2018)

JUDGMENT

Brief Background

1. A brief background of the matter before this court is that the respondent herein purchased shares in the 1st appellant so as to enable him to purchase the suit property.
2. Upon paying the sum of Kshs 51,000/= as requested by the 1st appellant herein the respondent subsequently balloted for a plot and was eventually allocated Plot number 6, Nanasi Estate Phase which is now known as Thika Municipality Block 14/597.
3. In 1998 the respondent paid a further 63,000/= to the 1st appellant herein for purposes of the provision of infrastructural services within the scheme known as Nanasi Estate Phase 1 as set up by the 1st appellant.
4. The 1st appellant failed to issue the respondent with an allotment clearance letter and other documents notwithstanding the fact that the respondent had made payment.
5. Later on, the respondent learnt that the suit property had been allocated and transferred to the 2nd respondent herein, who is a relative to the Chairman of the 1st appellant.



6. The respondent filed a claim at the tribunal.
7. The 1st appellant in its defence before the tribunal stated that the suit property was repossessed pursuant to the minutes of the Annual General Meetings held on May 11, 1997 and October 8, 2000 after the respondent failed to pay an initial sum of Kshs 51,000/= which was due since he was not an employee of Delmonte (K) and a further Kshs 69,000/= within 90 days from February 15, 2002.
8. In any event according to the 1st appellant the suit property had been allocated to the respondent by mistake and that the 2nd appellant herein balloted and purchased the said plot after it was repossessed. The 2nd appellant subsequently transferred the suit property to one Judy Mwhiki Kinyua on March 1, 2010.
9. It was argued that the respondent received a refund towards the end of June *vide* a Cheque No 1013664 dated July 28, 2010.
10. After hearing the parties, the Co-operative Tribunal delivered its Judgement on August 10, 2018 in favour of the respondent herein after finding that the 1st appellant herein did not have legal capacity to transfer the said plot to the 2nd appellant herein as it had not validly and lawfully cancelled the allotment of the said plot to the respondent and further that by the time the 2nd appellant had paid the Kshs 120,000/= the suit property was still not available.
11. Aggrieved by this decision the appellants have filed the appeal before this court on the following grounds;
 1. The tribunal erred in law and in fact in disregarding the evidence and submissions tendered by the 1st and 2nd appellants.
 2. The tribunal erred in law and fact in holding that allotment letter in respect of the suit property had been issued to the respondent while none was produced as an exhibit during the trial.
 3. That tribunal erred in law and fact in holding that there was no proof of set timelines for payment of various charges, yet relevant minutes and resolutions were produced which clearly show the timelines for making payments in respect of the suit property.
 4. The tribunal erred in law and in fact in finding that the 1st appellant did not have power to repossess the suit property for failure by the respondent to meet payment guidelines, and violating the 1st appellant's by laws and resolutions.
 5. The tribunal erred in law and in fact in failing to appreciate that demand notices were served upon the respondent.
 6. The tribunal erred in law and in fact in failing to appreciate that demand notices were served upon the respondent.
 7. The tribunal erred in law and fact in holding that the 2nd appellant's husband was the chairman of the 1st appellant at the time of repossession and transfer of the suit property to the 2nd appellant was done.
 8. The tribunal erred in law and fact in failing to appreciate that the claimant had already been refunded his dues thus it unlawfully conferred double benefit to the respondent in that the respondent received refund of the money paid to the 1st appellant and still he was awarded the suit property.



9. The tribunal erred in law and in fact in finding that the respondent met the conditions of purchase and or allocation of the suit property contrary to the evidence in record.
10. The tribunal erred in law and in fact as it ignored the 1st appellant's by laws especially by-law No no 22 on guidelines of plot acquisition.”
12. The appellants seek for orders that;
 1. The appeal be allowed.
 2. The tribunal's judgement delivered on 10/8/2018 be set aside.
 3. The respondent's claim be dismissed with costs.
 4. The registration of the respondent as proprietor of plot No Thika Municipality Block 14/597 and all subsequent transfer and registration made pursuant to tribunal's judgement delivered on 10/8/2018 be cancelled.”
13. The appellants thereafter filed written submissions where the following issues have been identified for determination:
 - a. Whether the Co-operative Tribunal had jurisdiction to determine the suit.
 - b. Whether the respondent breached the by-laws, and resolutions of the 1st appellant and set timelines for the payment of the said plot.
 - c. Whether the repossession and reallocation of plot No 6 now Thika Municipality Block 14/597 was valid and lawful; and who is to bear the costs of this appeal.
14. The appellants in their submissions reiterate that the respondent breached the by-laws, resolutions and notices of the 1st appellant and that the tribunal erred in failing to consider the timelines for payment as clearly stipulated in the timelines provided under the minutes and resolutions produced before it.
15. It is also the appellants' case that on March 27, 1998, a 60 days' notice was issued to the respondent to clear the balance. A second notice was issued on October 2, 2001 and a final notice issued on February 15, 2002 which was not acted upon.
16. The appellants also contend that article 22(d) of the 1st appellant's by laws provide that ‘all plot buyers must become members of the society’ and therefore the respondent was bound to pay the balance of the purchase price.
17. It is further contended that by virtue of being a member of the 1st appellant, the respondent was bound by article 13 of its by-laws on members obligations.
18. According to the appellants the respondent was given several notices to complete the payment but he failed and or neglected to honour. Additionally, that, upon issuance of notices, time became of essence and the respondent was bound to comply with his obligation's failure to which the 1st appellant was entitled to terminate the transaction.
19. In conclusion the appellants submit that no allotment letter was issued nor produced by the respondent. They also argue that the 2nd appellant was granted vacant possession.
20. The respondent in rebuttal also filed written submissions wherein the respondent argues that pursuant to section 76 of the *Co-operative Societies Act* it is the Co-operative Tribunal that is vested with jurisdiction to hear disputes between a member and Co-operative Society and hence although the



dispute before this court involves land the same was first filed at the tribunal as the respondent was a member of the 1st appellant.

21. The respondent also submits that pursuant to section 13(4) of the *Environment and Land Court Act* it is the Environment and Land Court that has sole jurisdiction in respect of appeals of decisions arising from subordinate courts, or local tribunals in respect of matters falling within the jurisdiction of the court.
22. According to him, the appeal ought to have been filed before the Environment and Land Court and therefore this court lacks jurisdiction.

Analysis and determination:

23. Having considered each parties case two issues crystallize for determination and these are whether the Co-operative Tribunal had jurisdiction to determine the suit and whether the applicant has made out a case for the grant of the orders sought.
24. On the first issue the court in the case of *Freizer Mumo v Jonah Kavithi Daniel & Magdalene Wayua Daniel (Sued as the representatives of the Estate of Daniel Mulwa Kavithi & 3 others* [2020] eKLR while citing with approval the Supreme Court case of *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others*, Application No 2 of 2011, held as follows;

“The Supreme Court in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others*, Application No 2 of 2011, pronounced itself on jurisdiction as follows:

“(68) A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

25. The court at paragraph 17 continues as follows;
 17. The jurisdiction of the Tribunal under section 76(1) of the Co-operative Tribunal Act is confined to matters pertaining to the “business of a Co-operative Society” and not a dispute on ownership of land, be it between members of the society or otherwise. Indeed, the issue of which court has the jurisdiction to determine disputes concerning the use, occupation and title to land have been exhaustively captured in the *Constitution* (article 162(2) (b)) and the *Environment and Land Court Act*. In addition, the *Land Registration Act* provides the manner in which a title deed may be cancelled, and by which court.



- “18. Section 80 of the Land Registration Act provides that the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. Section 2 of the Act has defined a court to mean “the Environment and Land Court and other courts having jurisdiction on matters relating to land, which is this case, are the Magistrates gazetted to deal with land matters”.
- “19. The Co-operative Tribunal is not one of the courts that is mandated to deal with land matters. Indeed, its jurisdiction is limited to deal with the disputes relating to the business of the Co-operative Society. The jurisdiction of the tribunal under the Co-operative Societies Act does not involve resolving the issue of ownership of land, and cancellation of titles which have been allegedly fraudulently obtained or registered. It is only the Environment and Land Court and the Magistrate’s Court that have the jurisdiction to handle such disputes.
- “20. However, if the dispute is in relation to any other business of the Society, like the *bona fide* officials; shareholding of the members, the payable dividends, the genuine register, amongst others, then the Tribunal will have exclusive original jurisdiction to deal with such issues. However, the moment the question of who owns or occupies a particular parcel of land arises, then the Tribunal ceases to have jurisdiction to deal with such a dispute.

Indeed, the Co-operative Tribunal does not have jurisdiction to make a declaration on the *bona fide* owner of a particular parcel of land.”

26. After the analysis of the facts and the evidence above it is my finding that the Co-operative Tribunal herein presided over and determined the issue of ownership of the suit property without jurisdiction.

Whether the applicant has made out a case for the grant of the orders sought.

27. Having established that the Co-operative Tribunal lacked jurisdiction, I see no value in analyzing and/or determining the second issue and the same collapses by the wayside.

Disposition:

28. The appeal and the judgment of the Co-operative Tribunal are hereby dismissed with costs.

DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

In the Presence of:

For 1st appellant:

For 2nd Appellant:

For Respondent

C/A

