



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 45 OF 2018**

**NICHOLAS NYALA MULWA.....1<sup>ST</sup> PLAINTIFF**

**FREIZER MUMO *alias* MBISI DANIEL.....2<sup>ND</sup> PLAINTIFF**

**ADAMSON MUTHAMA (*Suing as the legal representatives***

***ad litem of the Estate of the late TABITHA MULWA*).....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JONAH KAVITHI DANIEL AND**

**MAGDALENE WAYUA DANIEL (*Sued as the personal representatives***

***of the Estate of DANIEL MULWA KAVITHI*).....1<sup>ST</sup> DEFENDANT**

**MAGDALENE WAYUA DANIEL.....2<sup>ND</sup> DEFENDANT**

**THE LIQUIDATOR IN LUKENYA RANCHING &**

**FARMING CO-OPERATIVE SOCIETY .....3<sup>RD</sup> DEFENDANT**

**COUNTY LAND REGISTRAR OF MACHAKOS.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 24<sup>th</sup> April, 2019, the 2<sup>nd</sup> Defendant is seeking for the striking out of the entire suit with costs for want of jurisdiction.
2. The Application is premised on the grounds that the suit is premised on the ownership of 350 shares; that both the Plaintiffs and the 2<sup>nd</sup> Defendant are claiming for the said shares and that it is only the Co-operative Tribunal that can determine the true ownership of the shares the subject of the suit.
3. In the Replying Affidavit, the 2<sup>nd</sup> Plaintiff deponed that Section 13 of the Environment and Land Court Act and Article 162 (2) of the Constitution vests the jurisdiction to determine the dispute on occupation, use and title to land in this court; that Section 76(1) of the Co-operative Societies Act does not contemplate the Co-operative Tribunal to determine the issue of ownership of land and that one of the prayers being sought in the Plaint is the cancellation of the Title Deeds which was issued to the 2<sup>nd</sup> Defendant.
4. The 2<sup>nd</sup> Plaintiff deponed that in any case, the claim herein cannot be ventilated in the Tribunal because the Lukenya Ranching and Farming Co-operative Society has since been liquidated and that this court has the requisite jurisdiction to determine the suit.
5. In his submissions, the Defendants’/Applicants’ advocate submitted that the suit revolves around the acquisition, registration and allocation of parcels of land to share number 350 and that once the issue of the true owner of the share number 350 is determined, the issue of ownership of the suit land would have been resolved.
6. Counsel submitted that it is only the Tribunal established under Section 77 of the Co-operative Societies Act that has jurisdiction to hear and determine the issue of membership of a Co-operative and that it is only after the Tribunal has determined the issue of ownership of the

shares that this court will be clothed with jurisdiction by way of an Appeal.

7. On the other hand, the Plaintiffs' advocate submitted that the crux of the dispute herein is title to land; that the Plaintiffs are praying for the impeachment of the titles and that it is only this court that has the jurisdiction to determine disputes concerning occupation, use and title to land.

8. The Plaintiffs' counsel submitted that the provisions of Section 76(1) of the Co-operative Act do not contemplate the Tribunal to determine disputes concerning ownership of land and that the Tribunal has no jurisdiction to revoke title to land. Counsel relied on the case of *Kennedy Kimani Ndarwa vs Methi and Swani Farmers' Co-operative Society Limited & Another (2016) eKLR* amongst other authorities.

9. The Plaintiffs are the administrators of the Estate of the late Tabitha Mulwa, while the Defendants are the representatives of the Estate of Daniel Mulwa. The two deceased persons, Daniel Mulwa and Tabitha Mulwa were a husband and wife.

10. It is the Plaintiffs' case that their late mother, Tabitha Mulwa, was a shareholder or member of the 3<sup>rd</sup> Defendant (*the Society*) under membership number 350 and was entitled to four (4) parcels of land which are: Mavoko Town Block 3/3085/1498, 2364 and 1311.

11. According to the Plaintiffs, after the death of their mother, the 3<sup>rd</sup> Defendant colluded with their late father (*the 1<sup>st</sup> Defendant*) and caused to be transferred plot numbers 813, 74 and 163.

12. The Plaintiffs have averred that their late father, Daniel Mulwa, transferred plot number 163 to the 2<sup>nd</sup> Defendant (*their step-mother*) who was issued with a Title Deed; that the 2<sup>nd</sup> Defendant was also fraudulently registered as the proprietor of Mavoko Town Block 3/1311 and that the said transfers and registration of the suit properties in the name of the 2<sup>nd</sup> Defendant should be cancelled. The Plaintiffs are praying for the following reliefs in the Plaintiff:

***a. A declaration that allocation of L.R. Number Mavoko Town Block 3/1498 to the late Daniel Mulwa Kavithi was illegal and therefore null and void.***

***b. A declaration that the transfers effected by the Lukenya Ranching and Farming Co-operative Society to the 2<sup>nd</sup> Defendant in respect of parcels of land namely Mavoko Town Block 3/1311 and 2364 be declared a nullity.***

***c. An order directed to the 4<sup>th</sup> Defendant to cancel the title deeds issued to the late Daniel Mulwa Kavithi and the 2<sup>nd</sup> Defendant in respect of Mavoko Town Block 3/1498 and Mavoko Town Block 3/1311 and 2364 respectively and substitute the same with the name of the Plaintiffs the administrators of the Estate of the late Tabitha Mulwa.***

***d. In the alternative the Estate of Daniel Mulwa Kavithi (deceased) and the 2<sup>nd</sup> Defendant be ordered to compensate the Plaintiffs the equivalent market price value of parcels Mavoko Town Block 3/1498, 2364 and 1311.***

13. The 2<sup>nd</sup> Defendant, who is also an administrator of the Estate of the late Daniel Mulwa Kavithi, averred in her Defence that the deceased was a founding member of the 3<sup>rd</sup> Defendant; that he acquired share numbers 22, 241 and 22(*sic*) in the Society and that the Plaintiffs' late mother was not a member of the Society is alleged.

14. According to the 2<sup>nd</sup> Defendant, the Plaintiff's late mother held a share registered in her name by the late Daniel as a nominee; that the late Daniel Mulwa had the right to change or withdraw the name of his proxy from the Society's register and that he changed the said name after the demise of his wife -the Plaintiff's late mother.

15. From the pleadings, it has been conceded by the Defendants that indeed the late Daniel Mulwa Kavithi (*deceased*) was a member of the 3<sup>rd</sup> Defendant and by virtue of that membership, was entitled to the suit properties. While the Plaintiffs are of the view that some of the suit properties were fraudulently registered in the name of the 2<sup>nd</sup> Defendant, and that their late mother, Tabitha, was a *bona fide* member of the Society, the 2<sup>nd</sup> Defendant has disputed that fact.

16. Whether the Plaintiff's mother, Tabitha Mulwa, was a member of the Society independent from her late husband, Daniel Mulwa, can only be determined after trial. It is not in dispute that the 2<sup>nd</sup> wife of the late Daniel Mulwa, was never a member of the Society. However, the late Daniel Mulwa transferred some of the parcels of land, which the Plaintiffs' claim belonged to their late mother by virtue of her membership, to the 2<sup>nd</sup> Defendant.

17. Section 76(1) of Co-operative Societies Act provide 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.”***

18. The issue of whether the definition of the word “*business*” under Section 76(1) of the Act includes disputes in respect to ownership of land has not been settled.

19. As correctly stated by the court in the case of *Charles Keragita Arwenya vs Nyakoe Farmers’ Co-operative Society Ltd (2016) eKLR*, Section 76 of the Act ousts the jurisdiction of the High Court (ELC) in exercising original jurisdiction in disputes involving Co-operative Societies and its members.

20. The reading of Section 76(1) of the Co-operative Societies Act shows that the Tribunal has the exclusive original jurisdiction to deal with disputes relating to the business of a Co-operative Society arising among members, past members, persons claiming through members, past members and deceased members. The 2<sup>nd</sup> Defendant, who is the administrator and wife of the late Daniel Mulwa is neither a member nor a past member of the 3<sup>rd</sup> Defendant. To that extent, and considering that she has been registered as the proprietor of some of the impugned title deeds, the Tribunal does not have the jurisdiction to determine the dispute herein.

21. The Plaintiffs have further claimed that some of the suit properties were transferred to the 2<sup>nd</sup> Defendant fraudulently, and that the name of their late mother was fraudulently replaced in the Society’s register and replaced with that of the 2<sup>nd</sup> Defendant. The Plaintiffs are seeking for the cancellation of the Title Deeds that were issued to the late Daniel Mulwa Kavithi and the 2<sup>nd</sup> Defendant in respect of Mavoko Town Block 3/1498 and Mavoko Town Block 3/1311 and 2364.

22. Section 76(1) of the Co-operative Societies Act does not grant to the Tribunal the mandate to cancel Title Deeds registered under the Land Registration Act or at all. Where the claim among members of a Co-operative Society involves cancellation of Title Deeds, then it is only this court or the Magistrate’s Court that has the requisite jurisdiction to do so. That is what Section 80(1) of the Land Registration Act provides.

23. Indeed, the reading of Section 76(1) of the Act seems to restrict the mandate of the Co-operative Tribunal in respect to disputes involving the register, membership, shareholding, elections of officials of the Society and other internal disputes that may arise in the day today running of the Society. However, where allegations of fraudulent transfer of land which has already been registered arises, such a dispute will be governed by the provisions of the Land Act and the Land Registration Act. The two Acts clearly define a court to mean the Environment and Land Court established by the Environment and Land Court Act, and other courts having jurisdiction on matters relating to land.

24. In view of what I have stated above, I find that it is this court that has jurisdiction to deal with the dispute herein. For those reasons, the Application dated 24<sup>th</sup> April, 2019 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>st</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**