



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 92 OF 2018

MACHARIA KAMOCHIO

PATRICK GITHONGO

PETER KAHIU NGOCHI

STANLEY MUIRURI GATIMU.....APPELLANTS

VERSUS

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT

AND MARKETING.....1ST RESPONDENT

DISTRICT CO-OPERATIVE OFFICER NAKURU DISTRICT..2ND RESPONDENT

MBURU KINANI..... INTERESTED PARTY

(Being an appeal from the ruling and order of the Minister for Co-Operative Development and Marketing delivered on 7th June 2011 in Appeal No. 05 of 2009)

JUDGMENT

1. This appeal traces its roots to an order issued by the Commissioner for Co-operative Development on 26th November 2007, under **Section 62(1) (c)** of the **Co-operative Societies Act**, cancelling the registration of Kanyeki Farmers Co-Operative Society Ltd (hereinafter “the society”) with immediate effect. The society was registered in 1977 as a land buying co-operative and indeed acquired a parcel of land known as L.R. 3777/325 measuring about 1,126 acres. Pursuant to **Section 62(2)** of the Act, any person aggrieved by a cancellation order was required to lodge an appeal against it to the Minister for Co-Operative Development and Marketing within thirty days of the order. As it turned out, no appeal was filed within the requisite period. The appellants herein later moved the minister through an application dated 24th February 2009 in ministerial **Appeal No. 05 of 2009** seeking enlargement of time within which to appeal against the cancellation order and a liquidation order which was also issued. The minister heard and dismissed the application in a ruling delivered on 7th June 2011. The ruling also appears to have dealt with the merits of the appellants’ appeal against the cancellation and liquidation orders. Being dissatisfied with the said ruling, the appellants herein filled the present appeal on 8th August 2011 in the **High Court at Nairobi** as **Civil Appeal Number 380 of 2011**. By order of the said court made on 12th February 2015, the appeal was transferred to **ELC Milimani** and became **ELC Appeal No. 8 of 2015**. Subsequently, through an order of **ELC Milimani** made on 14th February 2018, the matter was transferred to this court and became **Nakuru ELC Case No. 92 of 2018**.

2. The grounds of appeal as listed in the memorandum of appeal are as follows:

1. *THAT the Honourable Minister erred in law and fact in finding that the society had achieved its objectives when they sold the land they had bought to Merironi Nyakinyua Self Help Group Ltd.*
2. *THAT the Honourable Minister erred in law and fact in failing to appreciate the evidence that there was still 130 acres of land to be distributed amongst members of the society.*
3. *THAT the Honourable Minister erred in law and fact in failing to find that the 1st respondent was wrong to order liquidation of the society when there were several pending court cases in the High Court as set out in the Appeal to the Minister.*

4. THAT the Honourable Minister erred in law and fact in finding that the membership of Kanyeki ceased upon the sale of the land to Merironi Nyakinywa Self Help Group.

5. THAT the Honourable Minister erred in law and fact in finding that no asset and/or property still exist that can be said to be owned by Kanyeki Farmers' Co-operative Society.

6. THAT the Honourable Minister erred in law and fact in finding that the appellants were not duly elected management committee of Kanyeki Farmers' Co-operative Society Ltd, that the society does not legally exist under the Co-operative Society's Act, and that it ought to have been liquidated.

7. THAT the Honourable Minister erred in law and fact in refusing to take into account the judgments in the various cases in which the 130 acres of the Society's land had been found to have been fraudulently acquired by Mburu Kinani a former chairman of the society.

8. THAT the Honourable Minister erred in law and fact in failing to make a finding that neither the society nor its members were notified nor served with the intention to de-register the society nor were they notified of any enquiry.

9. THAT the Honourable Minister failed in law to protect the interest of the members of the Kanyeki Farmers Society Ltd and the public interest at large.

3. The appellants therefore urge the court to allow this appeal, to set aside the order of the Honourable Minister dated 7th June, 2011 and to substitute it with orders allowing the appeal as prayed in the petition to the Minister. They also pray for costs of this appeal.

4. Although served with notice of hearing of the appeal, neither the appellants nor respondents attended the hearing either personally or through counsel. Counsel for the interested party argued that since no appeal was filed within the statutory timeframe, there is no valid appeal before this court. He relied on interested party's written submissions filed on 7th October 2016 and on 25th June 2019. It is argued in the written submissions that the cancellation of the society's registration was properly done since the society had been dormant for many years and had not held elections for more than 10 years. Counsel therefore urged the court to dismiss this appeal with costs.

5. The appellants and respondents did not file any submissions.

6. Having filed the present appeal, the appellants must advance arguments in its support so as to sustain it. Respondents and other parties opposing the appeal are only required to respond if the appellant advances arguments. **Order 42 Rule 19** of the **Civil Procedure Rules** provides:

19. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

7. Where an appellant does not appear at the hearing of the appeal and has not filed any written submissions, the court may dismiss the appeal. In that regard, **Order 42 Rule 20** of the **Civil Procedure Rules** provides as follows:

20. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.

(2) Where the appellant appears, and the respondent does not appear and has not filed a declaration under rule 16 (3), the appeal may be heard ex parte.

8. Although the above provision is couched in permissive terms, I note that the interested party in his submissions has for various reasons generally urged the court to dismiss the appeal. I do not think that any useful purpose will be served by going into a merit based consideration of those reasons. Similarly, owing to the failure of the appellants to attend the hearing or even to file submissions, I see no valid reason why the appeal should not be dismissed under **Order 42 Rule 20**. At the hearing of this appeal, counsel for the interested party created an impression that "parties had filed submissions" and so I retired to write judgment only to realise that there are no submissions from the appellants. Judicial time would have been saved if the court was moved at the hearing to dismiss the appeal under **Order 42 Rule 20**. That notwithstanding, it is not too late to invoke the rule.

9. In view of the foregoing, I dismiss this appeal under **Order 42 Rule 20** of the **Civil Procedure Rules** with costs to the interested party.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mrs Mbeche holding brief for Mr Kamere for the appellants

No appearance for the 1st and 2nd respondents

Mr Mburu holding brief for Prof Ojienda for the interested party

Court Assistants: Beatrice & Lotkomoi