



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.434 OF 2014

JONATHAN MUIGAI NJUGUNA.....1ST APPELLANT/APPLICANT
KAMANDE ITUTHU.....2ND APPELLANT/APPLICANT
PETER NDUNG’U NENE.....3RD APPELLANT/APPLICANT
GEORGE KIBATHA KAMAU.....4TH APPELLANT/APPLICANT
SAMUEL MUTURI NG’ANG’A.....5TH APPELLANT/APPLICANT
WANYOIKE WAWERU.....6TH APPELLANT/APPLICANT
NJUGUNA PETER KINYAGIA.....7TH APPELLANT/APPLICANT
JOHN KAMAU HUHO.....8TH APPELLANT/APPLICANT
KANGWATHA MAMIA.....9TH APPELLANT/APPLICANT
HOSEA MWINCHIGI.....10TH APPELLANT/APPLICANT
PETER GICHUHI MWANIKI.....11TH APPELLANT/APPLICANT
NYOIKE WAWERU.....12TH APPELLANT/APPLICANT
JOHN NJENGA GICECE.....13TH APPELLANT/APPLICANT

VERSUS

SAMUEL MWAURA.....1ST RESPONDENT
CHEGE NGAGE.....2ND RESPONDENT
WILSON KAMONYE.....3RD RESPONDENT
KIRIITA PYRETHRUM & VEGETABLES
GROWERS CO-OPERATIVE SOCIETY.....4TH RESPONDENT

(Being an Appeal from the Judgment /Award and or Decree of Honourable M.T. Kariuki Chairman, Cooperative Tribunal at Nairobi delivered on 19th day of September 2014, in the C.T.C No. 399 of 2005)

JUDGMENT

1. Jonathan Mungai Njuguna and 12 others being the 1st – 13th Appellants herein, filed a statement of claim before the Cooperative Tribunal, Nairobi against Samuel Mwaura, Chege Ngange, Wilson Kanonye Kuria and Kinita Pyrethrum & vegetables Growers Cooperative Society,

the 1st, 2nd, 3rd and 4th Respondents respectively. In the aforesaid statement of claim dated 21st September 2005, the Appellants sought for Judgment against the Respondents as follows:

- i) *A declaration that the 1st Respondent holds parcels of land, Kaisagat/Chepkoilel plot Nos. 109, 110, 111, 112, 113, 114, 115, 116, 119 and 120-127, 146, 147, 149, 150, 151, 152, 154, 5505/2 and LR No. 5505/2 upon trust for the 4th Respondent; 1st Respondent's wife, Margret W. Gitau, holds parcels Nos. 168 and 171 upon trust for the 4th Respondent whilst his son, Simon Njoroge Kamonye holds plots No. 90 upon trust for the 4th Respondent.*
- ii) *A declaration that the 2nd Respondent holds parcels of land Kaisagat/Chepkoilel plot Nos. 108, 211,214 and 240 upon trust for the 4th Respondent.*
- iii) *A declaration that the 3rd Respondent holds parcels of land Kaisagat/Chepkoilel plot Nos. 21, 59, 107, 213 and 125, upon trust for the 4th Respondent.*
- iv) *A declaration that the Respondents are under a duty to account to the claimants and the other members of the 4th Respondent the 4,200 acres comprised in LR. No.10343, LR. No. 497, LR No 505 and LR No. 6935, entrusted to them for sub-division as per the 1988 resolution of the 4th Respondent.*
- v) *A declaration that the Respondents are under a duty to account to the claimants and the members of the 4th Respondent the consideration paid by Mr. E.C Saina for LR. No. 5505/01, and the considerations paid upon sale of Kaisagat/Chepkoilel plot Nos. 91,191,192,195 and 196.*
- vi) *An order that the 1st Respondent transfers to the 4th Respondent Kaisagat/Chepkoilel Plot Nos. 109, 110,11,112, 113, 114, 115, 116, 119 and 120-127, 146, 147,148, 149,150,151,152,154,5505/2 and LR Nos. 5505/2.*
- vii) *An order that the 2nd Respondent transfers to the 4th Respondent Kaisagat/Chepkoilel Plot Nos 108,211,214, 240.*
- viii) *An order that the 3rd Respondent transfers to the 4th Respondent Kaisagat/Chepkoilel Plots Nos. 21,59,107,213 and 125.*
- ix) *An order that the Respondents account for all the parcels of land comprised in Kaisagat/Chepkoilel Block 5 (Kiriita) and Kobombo/Kologolo Block 1/ Kiriita originally LR. No. 6935.*
- x) *An order that the Respondents account to the claimants the proceeds of the sale of LR. No. 5505/1.*
- xi) *A permanent injunction to restrain the Respondents from transferring, selling, charging or otherwise dealing with 4th Respondent's parcels of land comprised in Kaisagat/Chepkoilel Block 5 (Kiriita), originally 10343, 5507,5505, and Kabombo/Kologolo Block 1/Kiriita originally LR. No. 6935.*
- xii) *An order that the Respondents account to the claimants, and other members of the 4th Respondent the proceeds of the sale of the coffee factory, 2 dairy garages, 5 tractors, 4 trailers, 4 ploughs, a pick – up, maize in stores, and livestock.*
- xiii) *An order that the Respondents account to the claimants, the moneys fetched from the sale of murrum from Kaisagat Farm.*
- xiv) *An order that the 1st to 3rd Respondents explain to the claimants and other members of the 4th Respondent the status of the parcels of land allegedly allocated for use by the church of the Province of Kenya, Mukeu Primary School, AIPCA church PCEA, AIC, Fathi Primary School and a shopping centre.*
- xv) *Such other reliefs as this Honourable court may deem fit to grant.*
- xvi) *Costs of the suit.*

2. Hon. M.T Kariuki, the chairman Cooperative Tribunal heard the claim and proceeded to dismiss it on the basis that the Tribunal had no jurisdiction to entertain the same. He also stated that the 4th Respondent was wrongly sued instead of being enjoined as one of the claimants.

3. Being aggrieved, the Appellants preferred this appeal and put forward the following grounds

- i) *THAT the Learned Chairman erred in deciding the claim on issues that were neither pleaded nor brought to the Tribunal for determination by the parties vide their pleadings.*
- ii) *THAT the Learned Chairman erred in failing to address the real issues that were pleaded and brought before the Tribunal for trial and determination by the parties.*
- iii) *THAT the Learned Chairman erred in finding and holding that the claim had been brought before the Tribunal prematurely.*

iv) **THAT the learned Chairman erred, whilst interpreting and applying the provisions of section 53 of the Cooperative Societies Act to the facts and circumstances of this case when he held that the claimants ought to have approached the Commissioner of Cooperatives to conduct an inquiry in terms of that section.**

v) **THAT the Learned Chairman erred in failing to appreciate that under section 78 of the Cooperative Societies Act, the Tribunal has jurisdiction to deal with claim before it being a dispute between present members of the society and the members of the management Committee of the Society as well as the society itself concerning its business.**

vi) **THAT the Learned Chairman erred in finding and holding that the documents filed by the parties in the Tribunal are not sufficient to the Tribunal make a finding as to whether Respondents are liable for misappropriating the 4th Respondent's property.**

vii) **THAT the Learned Chairman erred in failing to appreciate the special nature of the claim before the Tribunal; to wit, the dispute involved affairs of a particular membership of the large society who had invested in purchase of farms but whose affairs were managed by the larger society.**

viii) **THAT the Learned Chairman erred when he failed to appreciate that the 1st, 2nd and 3rd Respondents as members of the Management Committee of the Society, owed the Appellants and other members of the Society a fiduciary duty to act in good faith in running of the affairs and business of the society by virtue of the equity and section 28 of the Cooperative Societies Act, Cap 490 laws of Kenya.**

ix) **THAT the Learned Trial Magistrate erred by failing evaluate the evidence before him and to find that to hold that the 1st to 3rd Respondents breached the fiduciary duty owed to the Appellants and other members of the society in carrying out the resolution of members made on 6/10/1988 concerning sub-division of the Kitale farms subject matter of the claim to the members.**

x) **THAT the Learned Chairman erred in not finding and holding that the 1st Respondent breached his fiduciary duty to be found in the member's resolutions, equity and section 28 of the cooperative societies Act, when he allocated himself the following farms and town plots:**

i) **Farms at Kaimonde:**

a) **Plot Nos 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 121, 122, 123, 124, 125, 126, 1 27, 146, 147, 148, 149, 150, 151,1 52, 154, 216 and 217.**

b) **Plots Nos. 104,105 and 106, which though in the name of GOK are in his possession and use.**

c) **Plots Nos. 90 and 168 in the names of members of his nuclear family.**

ii) **Town plots;**

a) **Plots Nos 1,2,3,4,5,6,7,8,32,33,34,61,62 at Lari-Kiriita Trading Centre.**

b) **Plots Nos 3,321,22,30,34,35,36,39,40,60,75,25 at Maridadi – kirita Trading Centre.**

c) **Plot No.1 at Maridadi – Kiriita belonging to his wife.**

xi) **THAT the Learned Chairman erred in not finding and holding that the 2nd Respondent breached his fiduciary duty to the found in the members' resolutions, equity and section 28 of the cooperative society Act, when he allocated himself the following farms and Town plots:**

i) **Farms at Kaimonde**

a) **Plot Nos 108,211,214,240**

ii) **Town Plots**

a) **Plots Nos. 15 at Maridadi –Kiriita Trading Centre.**

xii) **THAT the Learned Chairman erred in not finding and holding that the 3rd Respondent breached his fiduciary duty to be found in the members' resolutions, equity and section 28 of the Cooperative Societies Act, Cap 490 , when he allocated himself the following farms and Town plots:**

i) **Farms at Gongwe/Kilongolo:**

a) **Plot Nos. 21,213,**

b) Plot No. 125 belonging to his son

ii) Farms at Kaimonde

a) Plots Nos 58,59,107

b) Plot No 294 belonging to his wife

iii) Town Plots

a) Plots Nos 26,27,90,91 at Lari – Kiriita Trading Centre

b) Plots Nos 9,28,29 at Maridadi – Kiriita Trading Centre

c) Plots Nos. 6, 7 belonging to his wife.

xiii) THAT the Learned Chairman erred in not finding and holding that Respondents are liable to account for the proceeds of sale of the land and other assets items sold a whilst they carried out the process of sub – division and in particular for:

a) LR No. 5505/1

b) IR No 5505/2

c) Kapamboi/Kolongolo /378 and 379

d) Livestock in both farms sold

e) All other items in the farms that were sold.

xiv) THAT the Learned Chairman erred in finding and holding that the 4th Respondent, the society had been wrongly sued.

4. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the same disposed of by written submissions. At the time of writing this judgment, the rest of the parties filed their submissions save for the Chege Ngange, the 2nd Respondent.

5. I have re-evaluated the case that was before the Tribunal. The claim was heard by two previous benches before Hon. M.T Kariuki took over to conclude. The record shows that Hon. M.T. Kariuki perused the statement of claim together with the documents and the submissions filed by both sides and came to the conclusion that the claim should not have been allowed to proceed for hearing before it.

6. He further opined that the claim was prematurely filed before the Tribunal and that the claimants should have approached the Commissioner for Cooperatives to inquire into the complaint under section 5 of cooperative Societies Act (cap 490 KOK).

7. The learned chairman also pointed out that the Appellants asked the Tribunal to make or conduct an inquiry which the Tribunal is ill equipped to carry out an inquiry of such a magnitude.

8. The learned chairman faulted the Appellants for enjoining the 4th Respondent as a Respondent yet it should have been made one of the claimants since the claim is in respect of the restitution of the 4th Respondent's misappropriated property.

9. It is apparent that the learned Tribunal chairman did not consider the merits of the Appellant's claim but he instead proceeded to dismiss it as against the 1st, 2nd and 3rd Respondents on the basis that the Tribunal had no jurisdiction to entertain the claim. The claim as against the 4th Respondent was dismissed on the basis that there was no cause of action directed at it.

10. Though the Appellants put forward a total of fourteen grounds of appeal, I am satisfied that the main ground which commends itself for determination is that touching on jurisdiction. The question is whether or not the Tribunal had jurisdiction to entertain the claim? It is in the submissions of the Appellant that the claim which was before the Cooperative Tribunal was a dispute between the members of the society, the management committee and the society concerning its business therefore the claim falls within that envisaged under Section 76(l) of the Cooperative Societies Act, therefore the Tribunal had jurisdiction to hear and determine.

11. The 1st and 3rd Respondent are of the submission that the Cooperative Tribunal had no jurisdiction to entertain the claim hence the decision of Tribunal chairman cannot be faulted. They argued that the Appellant should have approached the commissioner for cooperatives to entertain the claim pursuant to the provisions of section 58 and 73 of the Cooperative Societies Act.

12. The 4th Respondent is of the same submission as that of the 1st and 3rd Respondents that the Tribunal correctly ruled that it had no jurisdiction to hear and determine the Appellant's claim. It was pointed out that the claim was in the nature based on breach of fiduciary duty. It is said that the claimant cited persons who are not members of the Cooperative Society. It is also said that the declaratory orders sought were in respect of management which the Tribunal is ill equipped to supervise.

13. Having considered the rival submissions, it is clear in my mind that the jurisdiction of the Cooperative Tribunal is stated under section 76 of the cooperative societies Act; Under the aforesaid section the Tribunal's jurisdiction is defined as follows:

“If any dispute concerning the business of a cooperative 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 cooperative society, it shall be referred to the Tribunal***

14. The chairman Cooperative Tribunal held that the Appellants’ claim was premature and that the Appellants’ ought to have first approached the commissioner for cooperatives to conduct an inquiry instead of filing a claim before the Tribunal.

15. It would appear from the provisions of section 58(l) of the Cooperative societies Act that the commissioners for cooperative may of his own accord or upon directions from the Minister or on the application of not less than one third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by- laws working and financial conditions of any cooperative society.

16. It is also apparent that under section 73 of the Cooperative Societies Act it is provided as follows:

“(1) where it has taken part in the organization or management of a cooperative society or any past or present office or member of the society (a) has misapplied or retained or become liable or accountable for any money or property of the society or (b) has been guilty of misfeasance or breach of trust in relation to the society, the commissioner may, on his own coconut or on the application of the liquidator or of any creditor or member inquire into the conduct of such person.

(2) Upon inquiry under subsection (1) , the commissioner may , if he considers it appropriate, make an order requiring the person to repay or restore the money or property or nay part thereof to the cooperative society together with interest at such rate as the commissioner thinks just or contribute such sum to the assets of the society by way of compensation as the commissioner deems just.”

17. A careful reading of the two provisions i.e sections 58 and 73 of the Cooperative Societies Act will reveal that some matters or claims required to be referred to the commissioner for cooperatives may also overlap with those required to be filed before the cooperative Tribunal. The law does expressly state that a claimant must first file his claim with the commissioner for cooperatives before approaching the Tribunal, therefore the question as to whether a claim is prematurely before the Tribunal does not arise.

18. It would appear the two avenues could be approached as alternative methods of dispute resolution mechanisms in cooperative societies disputes. In other words, the fact that there is an alternative remedy did not oust the cooperative Tribunal’s jurisdiction to hear the dispute.

19. Having re-evaluated the evidence presented before the Tribunal, it is clear that the claim which was before the Tribunal is that envisaged under section 58 of the cooperative societies Act, hence the Tribunal had jurisdiction to hear and determine it. The learned Tribunal chairman therefore fell into error when he denied the Tribunal jurisdiction.

20. In the end, the appeal is allowed. The order dismissing the Appellants’ claim is set aside. The claim is reinstated and remitted back to the cooperative Tribunal to determine the claim on its merits by considering the evidence already tendered before it.

21. In the circumstances of this appeal, a fair order on costs is to direct which I hereby do, that each party meets its own costs on appeal.

Dated, Signed and Delivered at Nairobi this 21st day of January, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st & 3rd Respondent

..... for the 2nd Respondent

..... for the 4th Respondent