



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 7 OF 2015

FREIZER MUMO *alias* MBISI DANIEL.....PLAINTIFF

VERSUS

JONAH KAVITHI DANIEL

MAGDALENE WAYUA DANIEL (*Sued as the representatives of the Estate of*

DANIEL MULWA KAVITHI.....1ST DEFENDANT

MAGDALENE WAYUA DANIEL.....2ND DEFENDANT

THE LIQUIDATOR,

LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY....3RD DEFENDANT

COUNTY LAND REGISTRAR OF MACHAKOS.....4TH DEFENDANT

RULING

1. In the Notice of Motion dated 24th April, 2019, the 2nd Defendant is seeking for the following orders:

a. That the suit herein be struck out for want of jurisdiction of the court.

b. That the costs of this Application and the suit herein be borne by the Plaintiff/Respondent.

2. The Application is supported by the Affidavit of the 2nd Defendant who has deponed that she is the 2nd Administrator of the Estate of the late Daniel Mulwa Kavithi; that the Plaintiff's suit is premised on the ownership of share number 241 in the 3rd Defendant; that both the Plaintiff and the 2nd Defendant are claiming shares through a member and that it is only the Co-operative Tribunal which can determine the true ownership of the share of the subject land.

3. According to the Applicant, this court does not have the requisite jurisdiction to hear the matter; that it is only after the determination of the ownership of the disputed share that the issue of allocation of land will crystalize and that this suit should be struck out.

4. In opposing the Application, the 1st Administrator of the Estate of the late Daniel Mulwa Kavithi deponed that the Title Deeds in respect to the suit land have already been issued; that the prayer that has been sought in the suit is the cancellation of the Title Deeds and that it is only this court that has jurisdiction to deal with the issue of cancellation of the Title Deeds.

5. On his part, the Plaintiff deponed 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; that it is only this court that has the jurisdiction to cancel Title Deeds and that the issue of ownership of shares has been incorporated in the pleadings to demonstrate the fraudulent acts towards the issuance of the Title Deeds in question.

6. In his submissions, the 2nd Defendant's advocate submitted that the dispute herein revolves around the acquisition, registration and allocation of land in respect of share number 241; that once the issue of the true ownership of share number 241 is resolved, it follows that

the issue of the allocation of the land thereof will be resolved in its entirety and that it is the Co-operative Tribunal that has the jurisdiction to deal with the present dispute.

7. Counsel submitted that without a decision by the Tribunal as to whether the Society conducted its business well in registering members and allocating them land, this court cannot have jurisdiction to entertain the suit and that the suit was filed prematurely in this court.

8. On his part, the Plaintiff's advocate submitted that the Plaintiff's main prayer is for the cancellation of the Title Deed that was issued to the late Daniel Mulwa Kavithi and the 2nd Defendant in respect of the suit properties; 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 it is only this court that has jurisdiction to determine the issue of ownership of land. Both the Plaintiff and the Defendants' counsels relied on numerous authorities which I have considered.

9. In his Amended Plaintiff dated 21st February, 2018, the Plaintiff averred that he was a shareholder of the 3rd Defendant under member number 241; that as a member, he was entitled to the allocation of four (4) parcels of land being Mavoko Town Block 3/2261; 2563; 1306 and 1493 and that he neither surrendered nor sold his membership and ownership of the said parcels of land.

10. According to the Plaintiff, on 2nd June, 2006, 22nd February, 2008 and 26th September, 2002, Daniel Mulwa Kavithi (*deceased*) fraudulently had parcels of land known as Mavoko Town Block 3/2261, 2563, 1306 and 1493 registered in his name, whereafter the 1st Defendant had parcel number Mavoko Town Block 3/2261 sold to a third party while Mavoko Town Block 3/2563 was transferred to the 2nd Defendant.

11. In the particulars of Fraud against the Defendants, the Plaintiff has averred that the Defendants secretly transferred his parcels of land without his consent to the deceased and the 2nd Defendant and that the Defendants purported to de-register him from the Society's Member's register illegally.

12. In the Plaintiff, the Plaintiff is seeking for a declaration that the allocation of parcels of land known as Mavoko Town Block 3/2261, 2563, 1306 and 1493 to the late Daniel Mulwa Kavithi was illegal and for the cancellation of the Title Deeds that were issued to Daniel Mulwa Kavithi.

13. In their Defence, the 1st and 2nd Defendants denied that the Plaintiff was member number 241 in the 3rd Defendant; that member number 241 belonged to one Joel Mwanzia who sold his membership to the 1st Defendant in 1979 and that the 1st Defendant has at all material times been the lawful proprietor of the said share.

14. According to the 1st Defendant (*deceased*), he caused the name of the Plaintiff, who is his son, to be registered in the Society's register to hold the said share for and on his behalf, a position that was a common practice in the Society which allowed existing members who did not wish to appear in the register more than once to provide names of persons to act as proxies on their behalf and benefit.

15. The 2nd Defendant, who is one of the Administrators of the Estate of the 1st Defendant, has objected to the jurisdiction of this court in determining the dispute herein. According to the 2nd Defendant, it is the Co-operative Tribunal which has jurisdiction to hear the dispute. The 2nd Defendant relied on the provisions of Section 76(1) of the Co-operative Societies Act which provides 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.”***

16. 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.”

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 canceled 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 in 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.

21. That being the case, I find the Notice of Motion dated 24th April, 2019 by the 2nd Administrator of the Estate of the late Daniel Mulwa Kavithi, who is also the 2nd Defendant, to be unmeritorious. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE