



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.95 OF 2015

MOTO FARMERS CO-OPERATIVE SOCIETY LTD....APPELLANT

-VERSUS-

PETER CHELULE.....1ST RESPONDENT

ELIZABETH WANGUI NJENGA.....2ND RESPONDENT

JANE WANGUI CHEGE.....3RD RESPONDENT

BENSON GICHUKI CHEGE.....4TH RESPONDENT

FRANCIS NJUGUNA CHEGE.....5TH RESPONDENT

(An Appeal from the Judgment of Hon. S. M. Mungai (Chief Magistrate) delivered

at Nakuru on the 8th July, 2015 in Nakuru CMCC No.1804 of 1995)

JUDGMENT

INTRODUCTION

1. The appellant filed suit against the 1st respondents in his capacity as the plaintiff's liquidator and 2nd to 5th defendants as administrators of the estates of Simon Njenga Wainaina and Joseph Chege Nduguga. The plaintiff's case is that the 1st defendant advertised and sold the plaintiff's property to the 2nd to 5th defendants in existence of restraining orders making the said sale unlawful and or fraudulent.

2. The plaintiff sought the following orders:-

i. A declaration that the 1st defendant has no *locus standi* to exercise powers of a liquidator for the plaintiff society and an order to restrain the defendant from acting as liquidator until determination of appeal to Ministry of Cooperatives.

ii. A declaration that the advertisement, sale, transfer, occupation and dealings in the plaintiff's premises on Grant Number LR No.9716 Molo and related bank accounts and rent was wrongful, illegal and a nullity.

iii. Special damages.

iv. General damages. Mesne profit. Mandatory order compelling the 2nd, 3rd, 4th and 5th defendants to give vacant possession to the plaintiff of the suit premises, to surrender the title to Grant Number LR No.9716 Molo and to execute documents to effect transfer thereof to the plaintiff.

v. Costs of the suit and interest.

3. In their response, the 2nd to 5th defendants filed joint statement of defence. They denied any dealings with the 1st defendant, existence of any restraining orders nor having illegally or fraudulently purchased the suit land. They averred that they are administrators of the estate of the deceased persons who legally purchased the suit property, which has since been distributed.

The 2nd to 5th defendants further stated that the suit was time barred and the court lacked jurisdiction; and further, if plaintiff was entitled to any remedy, it lay elsewhere.

4. The trial magistrate found that the plaintiff failed to prove its case on a balance of probabilities and dismissed the suit with costs to the defendants. The defendant being dissatisfied with the courts determination filed this appeal on the following grounds:-

- i. That the learned chief magistrate in the 1st place erred in fact and in law in failing to draw issues for his determination in the matter.
- ii. That the learned chief magistrate erred in fact and in law in failing to note and comprehensively lay out the plaintiff's case and evidence and that of either defendants before proceeding to determine the same.
- iii. That the learned chief magistrate erred in fact and in law in ignoring and failing to look at and determine the plaintiff's case and evidence, proceeded to look only at the defendant's case, and determined the suit on the defendants' issues only.
- iv. That the learned chief magistrate erred in fact and in law in determining the matter on issues like lack of company resolution and verifying affidavit that were not substantive and not fatal to the case.
- v. That the learned chief magistrate erred in fact and in law in determining the matter on issues that were not before him and also on issues raised late at the submission stage and without issuing proper direction on response on the same.
- vi. That the learned chief magistrate erred in fact and in law in failing to specifically note and rule on a host of issues and facts raised by the plaintiff.
- vii. That the learned chief magistrate erred in fact and in law in holding that the respondents bought the property after a court order was lifted and failed to note and consider that the membership of the plaintiff, the appeal filed by the plaintiff and liquidation notice were integral and determining factors in their own right.
- viii. That the learned chief magistrate erred in fact and in law in blatantly ignoring the ruling and order of the Minister of Cooperatives and the letter of the Ministry of Co-operative Society effectively ordering the return of the plaintiff's property.
- ix. That the learned chief magistrate erred in fact and in law in failing to note the presence or absence of the 1st defendant in this matter and the import of the judgment against the 1st defendant in the matter.
- x. That the learned chief magistrate erred in fact and in law in ruling and determine the matter against all principles of natural justice, ruled and determine the matter on procedural technicalities and proceeded to pronounce a ruling and order that was unconstitutional in substance.
- xi. That the learned chief magistrate erred in fact and in law in determining the matter against over ten issues raised by the plaintiff and determined the matter on about four issues raised by the defendant and thereby ruled against the weight of evidence.
- xii. That the learned chief magistrate erred in fact and in law in failing to note and consider that the facts and the situation was constantly changing necessitating numerous amendments and should not have ruled that the plaintiff were departing or inconsistent in their pleadings.
- xiii. That the learned chief magistrate erred in law and in fact in failing to note that the defendants could not legally state how they obtained and transferred the property to themselves and the court itself erred by not stating how the defendants legally and procedurally acquired the suit property.
- xiv. That the learned chief magistrate erred in law and in fact in requiring the plaintiffs to plead law.
- xv. That the learned chief magistrate erred in fact and in law in stating that the plaintiffs did not respond to the issue of jurisdiction when in fact the plaintiff responded in their submissions and which in fact points out that the learned chief magistrate did not carefully read and consider the plaintiff's pleadings and submissions.
- xvi. That the learned chief magistrate erred in fact and in law and exercised his discretion unfairly and injudiciously and ruled against the balance of convenience.

SUBMISSIONS BY APPELLANT

5. The appellant restated the grounds of appeal. The appellant submitted that the suit herein arise from notice of liquidation issued by Commissioner of Cooperatives to the appellant on 5th July, 1995. Following the liquidation order the Commissioner appointed defendant as liquidator. Reason given for liquidation was that the members of the society were less than 10 contrary to requirement that the membership should not be less than 10. Appellant submitted that the reason for liquidation was contested by members who alleged their number was 171. Appeal was lodged to the Minister dated 21st July 1995. Appellant submitted that the notice gave grace period of 2 months before liquidation could commence but the 1st respondent went ahead to advertise the appellant's asset for sale. Appellant submitted that the advertisement indicated that the bid should reach the 1st appellant by 22nd August, 1995 which is within the two months grace period of the

notice of liquidation thus making the advertisement unlawful, illegal and a nullity in law; that it follows that the appellant did not have the *loci standi* to act as liquidator for the appellant.

6. The appellant further submitted that it applied for injunction which was issued to restrain sale of its properties but the 1st respondent went ahead to sell appellant's property. Appellant submitted that change in ownership of property through sale and demise of the purchasers forced it to amend the the plaint twice to change names of the parties.

7. On the issue of suit property having been distributed, the appellant submitted that the parties herein were aware of existence of this suit. Appellant submitted that at the time of sale, there was injunction and further, the sale was done by a private advocate and proceeds were not remitted to the appellant, there was no proof of payment of stamp duty for transfer, no clearance certificate to show that the sale was free from fraud.

8. On the issue of 2nd to 5th defendants being innocent purchasers, appellant submitted that there must be a good title for vendor to have capacity to sell and in this matter the 1st respondent had no *loci standi* as the sale was within the 2 months grace period and there was also an injunction; that the 2nd to 5th defendants could not inherit a title which had been obtained fraudulently and/or unprocedurally.

9. Appellant submitted that a crucial issue is to determine whether the initial sale was valid. Appellant submitted that two letters produced as exhibits from Provincial Cooperative Officer and Commissioner of Cooperatives indicated that the 1st respondent acted fraudulently and should return the appellant's property. It submitted that the only documents produced by 2nd to 5th defendant is sale agreement but there is no clearance certificate. It further submitted that the sale agreement was done when the matter was already in court.

10. Appellant submitted that the issue of jurisdiction which is one of the basis for the trial magistrate's decision was raised at submission stage. Appellant submitted that new prayers for cancellation of title fall within the high court but after being introduced it went without attention of the parties and court and was only raised in submissions. Appellant submitted that the suit should have been transferred to High Court upon introduction of the new prayers rather than dismiss for lack of jurisdiction.

11. Appellant further submitted that the trial magistrate erred in dismissing the suit instead of affording the parties an opportunity to transfer the matter to the High Court; that this matter was never determined on merit before a court with competent jurisdiction. That the 1st defendant did not have *loci standi*. Appellant urged court to set aside the trial magistrate's determination and enter judgment in favour of the appellant as prayed in memorandum of appeal.

12. On the other hand, the respondent/defendant submitted that the trial magistrate comprehensively dealt with matters placed before him in pleadings and submissions. Respondent submitted that the appellant departed from pleadings and dealt with issues not plead such as fraud against administrators of the purchasers. Respondent cited the case of **Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) Versus Stephen Mutinda Mulle & Others Civil Appeal No.219 of 2013** where the court held that parties are bound by their pleadings. The holdings was as follows:

“In fact, that parties are not allowed to depart from their pleadings and that any evidence led by any of the parties which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

13. Respondent submitted that the appellant cannot cry foul that evidence adduced was not considered as the issue of fraud was only pleaded against the 2nd and 5th defendants and not deceased persons; further, that notwithstanding, no evidence of fraud was tendered in the trial court. Respondent further cited the case of **George Ted Osewe Odero & 3 Others versus Pauline Adhiambo Raget & 5 others [2016] eKLR** where the court held that allegations of fraud must be specifically pleaded and prove is higher than that of balance of probabilities.

14. On the issue that the trial court did not consider the Minister's decision, the respondent submitted that the Minister's decision on appeal came after 6 years and by that time, the suit land had been sold and the decision was overtaken by events.

15. Respondent further submitted that orders staying liquidation had been set aside by rulings dated 19th September 1995 and 10th October 1995.

16. Respondent submitted that contrary to allegation that the respondents failed to state how they acquire property, the appellant's witness PW1 admitted that the property was sold through tender and respondents produced sale agreement, transfer forms and copy of title deed; which is more than enough prove that the property was purchased legally.

17. Respondent submitted that it raised 2 issues; one being that registration of titles Act (now repealed) gave High Court exclusive jurisdiction to deal with titles issued under that regime; two, that the property had devolved to heirs.

18. Respondent further submitted that the appellant failed to raise issue of jurisdiction before the trial court neither did it make application to transfer the matter to the High court; that the appellant had time to respond to the issues before the trial court but chose not to; thus it's the cause of its misfortune and should not seek to benefit from it.

ANALYSIS AND DETERMINATION

19. This being the first appellate court, I am required to reevaluate evidence adduced in the trial court and arrive at an independent determination.

20. I have considered grounds of appeal raised and response by the respondents. I have also perused record of appeal and considered submissions filed by the parties herein.

21. From submissions herein, there is no dispute that under registrar of titles Act, the trial magistrate did not have jurisdiction in respect of titles registered under the repealed Act. The prayers sought were for court do make a finding that the 1st defendant did not have no *loci standi* to act as liquidator and if the finding was to be to the affirmative, it would have necessitated cancellation of title issued to the deceased persons.

22. On perusal of the amended plaint, the appellant sought a declaration that the 1st defendant had no *loci standi* to exercise powers of a liquidator for the plaintiff, perpetual injunction to restrain the 1st respondent from acting as liquidator for plaintiff, declaration that the sale, transfer, occupation dealing in the suit property was wrongful, illegal and a nullity, general damages and mesne profit.

23. In the second amended plaint, in addition to the above prayer, the appellant sought mandatory order to compel the 2nd to 5th defendants to give vacant possession of the property and execute documents to effect transfer to plaintiff.

24. The initial plaint only had prayer in respect to powers of liquidator and sought restraining orders against liquidator, general damages and costs of the suit.

25. There is no doubt that new prayer were introduced which ousted jurisdiction of the court

26. I consider the following as issues for determination:-

I. Whether 1st defendant/respondent had loci standi to exercise powers as liquidator on behalf of the plaintiff

II. Whether advertisement, sale and transfer of the suit property by the 1st defendant is null and void

Whether the 1st defendant had loci standi to exercise powers on behalf of plaintiff

27. PW1 testified that notice of liquidation was issued by Commissioner of Cooperatives on 5th July 1995. Following the liquidation order the members of the plaintiff filed appeal on 21st July 1995. He produced proceedings of appeal. He further testified that the plaintiff obtained an injunction from court on 14th May 1995. He produced injunction of 22nd August 1995.

28. I have seen in the record of appeal a certified copy of liquidation order dated 5th July 1995. The letter appointed Mr. P. Chelule as liquidator and in the said order any member of the plaintiff dissatisfied was required to appeal to the Minister within two months. By letter dated 20th July 1995 members of the plaintiff objected to sale of the plaintiff's property. The 1st defendant sold the suit property on 29th November 1995 as shown in the sale agreement. In their evidence, the 2nd to 5th defendants confirmed that their deceased parents tendered for the property and paid kshs.625,000 in instalments. They testified that the stay order was set aside before the sale of the suit property.

29. Section 61 of the **Cooperative Societies Act** provide procedure for dissolution as follows:-

“(1) If the Commissioner, after holding an inquiry under Section 58 or making an inspection under Section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, **in writing, order the dissolution of the society and subsequent cancellation of registration.** (2) Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, **within two months after the making of such order, appeal against the order to the Minister with a final appeal to the High Court.**

(3) Where **no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Minister or by the High Court, as the case may be.**

30. It has not been disputed that the appeal was filed within the prescribed 2 months. Liquidation order is dated 5th July 1995. The memorandum of appeal was filed on 21st July 1995. This was within the prescribed 2 months.

31. This therefore mean that, as provided above that the liquidation order ceased to take effect upon the filing of the appeal. The liquidator was not therefore seized with power to proceed with sale of the plaintiff's property. The Minister subsequently lifted the liquidation order on 19th February 2001.

Whether the trial court had jurisdiction to entertain this matter

32. Both parties herein agree that the new prayers brought in by amendment of plaint was a preserve of the High court.

33. Whereas both parties herein agreed that the trial magistrate lacked jurisdiction to entertain issues in respect of title under Registration of Titles Act, none of the parties nor the court addressed the issue as to whether the subordinate court had jurisdiction to issue any injunctive orders or at all in respect of liquidation of cooperative societies.

34. section 69 of the Act provide for Appeal against order of liquidator or Commissioner as follows:-

“(1) A person aggrieved by any order or decision of the Commissioner or the liquidator under section 66 or section 68, as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision. (2) A person aggrieved by a decision of the Tribunal under subsection (1) may appeal to the High Court within thirty days of the decision. [Act No. 2 of 2004, s.31, Sch.] 70. Enforcement of orders Subject to sections 68 and 69, any order or decision made under section 66 or section 68 on being filed in the court, may be enforced in a court in the same manner as if the order or decision were an order or decision of the court.

35. From the provisions of cooperative Act, the trial court lacked jurisdiction to entertain issues arising from liquidation of the plaintiff. Parties herein went to the wrong forum for injunctive orders which were issued on 28th July 1995 and set aside on 10th November 1995. Besides finding that the liquidator was not seized with powers to liquidate the plaintiff, injunctive orders issued by trial court and subsequent order to set aside are inconsequential as the court was acting without jurisdiction.

36. And even if the restraining orders were made in the right forum and supposing the liquidator had powers to do so, I have not seen any advertisement of the property after court set aside of injunctive orders. The tenders issued had timelines; the tenders as per advertisement were to be received by 1st respondent on 22nd August 1995. Injunctive orders were issued on 22nd and 28th August 1995. By application dated 14th September 1995 the 1st respondent sought to review of the injunctive. A ruling delivered on 10th November 1995 set aside restraining orders of 28th August 1995. The 1st defendant sold the suit property on 29th November 1995. 10th November 1995 when injunctive orders were set aside was way far from 22nd August 1995 the deadline set by 1st respondent for receiving tenders. My view is the liquidator should have advertised the property again if he believed that he still had powers to dispose the assets.

37. The process having been stayed and tender timelines having lapsed, my view is that the liquidator should have advertise the properties again. The liquidator was also aware that the appeal was filed within the required 2 months and was still pending before the minister; it would have been prudent to allow the appeal process to especially know that the liquidation order granting him power to sell the property was being challenged.

38. From the foregoing, I find that the liquidator did not have powers to liquidate the plaintiff and any action carried out without requisite powers is a nullity.

39. FINAL ORDERS

1. The 1st respondent acted without powers from the commissioner cooperative societies in disposing the suit property herein’
2. The trial court lacked jurisdiction to deal with issues arising from liquidation order.
3. Acts by the 1st respondent after filing of appeal to the minister of cooperative Development are hereby declared a nullity.

Judgment dated, signed and delivered at Nakuru this 11th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Gai & Mr. Mutai holding brief for Koome Counsel for Appellant

N/A Counsel for Respondent