



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA CASE NO. 1 OF 2018

FORMERLY HCCA NO. 60 OF 2016)

*(Being an appeal arising from the judgement of the Chairman of the Cooperative Tribunal,
Mr. M. T. Kariuki dated 08/06/2015 in the original Cooperative Tribunal Case no. 36 of 2011)*

THOMAS AKINYI APELA.....APPELLANT

VERSUS

LOLWE COOPERATIVE SOCIETY.....RESPONDENT

JUDGEMENT

Thomas Apele Akinyi(hereinafter referred to as the appellant) filed a claim in the Cooperative Tribunal against Lolwe Housing Cooperative Society Ltd (hereinafter referred to as the Respondent) claiming that the appellant was a member of the respondent and held a number of shares for plot 494, 508, 509 and 510. The appellant obtained a grant of letters of administration intestate in respect of his father's estate.

Before the Cooperative Tribunal, The plaintiff averred that he paid for the shares at Kshs. 40/= per share and was issued with share certificates for the same. He was lawfully and rightfully allocated Plot Number 509 as it appeared on the map on the 29/4/1995 by the Respondent and same was indicated in the share certificate.

He lawfully and rightfully bought Plot Number 510 from one Joash Obongo Okeyo Amwai for which he did not obtain a share certificate but the plot was transferred to him.

That he was lawfully and rightfully allocated Plot Number 508 as it appeared on the map on the 1/9/90 by the Respondent and same was indicated in the share certificate. That Zacharia Owino Apela (now deceased) bought Plot Number 494 (now transferred to Plot 70) for and on behalf of the plaintiff but was never issued with a share certificate.

That sometime in the year 2013, the appellant discovered that some people unknown to him were illegally and unlawfully erecting structures upon his plot Numbers 508, 509, 510 and 494 (now transferred to plot 70) rightfully allocated to him by the respondent devoid of his knowledge, consent and authority.

Upon making inquiries the appellant discovered that the said plots had been irregularly and fraudulently re-allocated to third parties by the respondent herein without his knowledge and consent.

The appellant prayed for an order that plot Numbers 508, 509, 510 and 494 (now transferred to Plot 70) belongs to him and that the actions by the Respondent to allocate same to a 3rd parties was dishonest and unlawful

In the alternative, the appellant prayed that he be compensated for the fair and just price thereof or separate plots be allocated to him. He further prayed for General damages for breach of fiduciary duty to the claimant by the respondent. Lastly he prayed for the costs of the claim and interest.

The respondent filed defence stating that the appellant sold his parcel number 508 and 509 to person known to himself and that parcel number 510 has never belonged to the appellant that is why the appellant doesn't have Share Certificate, has no receipt for payment of membership fees and has never paid anything to the respondent and if at all he has ever owned parcel number 510 then, he has been owning it by word of mouth.

That parcel number 494 belongs to the late Zacharia Owino Apela the brother to the APPELLANT and would be handed over to the lawful administrators of the late Zachariah Owino Apela and prayed that the claim be dismissed.

When the matter came up for hearing the appellant stated that he was one of the founder members of the respondent being number 72. Once one becomes a member he is entitled to a plot. He was allocated six plots namely 494, 508, 509, 520, 521 and 510. The plots that were in dispute in this case according to the appellant are 494, 509 and 510. He was okay with the other plots. With regard to plot number 509 he had a share certificate. The date of the share certificate was 29/04/95. After balloting he was issued with share certificate. He later discovered that someone had developed the plot.

On cross examination he stated that Plot No. 494 was in the name of Zachary Apela and that he had not taken out letters of administration. The widow too had not taken out letters of administration. Plot No. 510 was sold to the appellant by Joash Obongo Obong'o. He was never given a share certificate. The procedure is that one has to take the share certificate and the agreement to the society. The certificates were not available at the time. He did not have a sale agreement between himself and Obong'o. He only had a transfer form signed by Obong'o for plot number 510.

The respondent called Edward Andat Koga a resident of Lolwe in Kisumu who stated that plot number 510 was a clear case of the appellant being conned by one Mr. Obong'o Obong'o who has since passed on. After they looked at the documents they discovered that the appellant was given the plot after doing some private work for Obongo which was not acceptable to them. The transfer of the plot to the appellant by Joash Obong'o Obong'o was fraudulent. The transfer was not authorized by the management.

Mr. Obongo Obongo was the treasurer of the society but the bylaws of the respondent only allowed the secretary of the society to execute a transfer after authenticating ownership. The chairman was to sign as a witness.

There was a conflict of interest in the sense that Obongo Obongo authorized the transfer and also signed as the seller. He misallocated the areas and beacons the respondent had put in place. No other official signed. Plot number 509 was repossessed by the society after the appellant failed to file form C. He presented a share certificate but no receipts of payment for the plot. In the AGM of 2007 there were complaints that the former secretary had refused to hand over the register of members. It was resolved that all members fill form c and atleast testimonials of how they acquired plots. One had to attach a membership card, share certificate and receipts for payment if he/she had bought a plot from the society directly.

On cross examination he stated that without a register they could not verify who their members were. The share certificate of the appellant was fake. The society does not print fake certificates. The certificate has not been taken to an expert to verify whether it is fake.

After hearing the parties and considering the evidence on record, the Tribunal found that the issue to be determined is whether or not plot numbers 509 and 510 within Lolwe housing belonged to the Appellant.

The Tribunal found that for plot number 509 there is no dispute that the claimant has a share certificate for the same which appears to have been issued on 29th of April, 1995 but added that there was evidence of loss of records and fraud in allocation of plots. The Tribunal noted that the respondent through the AGM resolved to have harmonisation of records of plots to be done by the committee upon filing in form c. Members were required to fill form c in order to authenticate ownership of the plots but the appellant did not comply. The Tribunal found that the resolution of the AGM was binding upon the appellant and that the failure of the appellant to comply with the resolution that the members were to file forms was not proper. Having failed to fill Form C the appellant did not prove ownership of plot number 509 but was entitled to a refund.

On plot number 510 the Tribunal found that the appellant neither produced a sale agreement nor a share certificate from Joash Obong'o Obong'o, and therefore it was difficult finding him to be the owner of plot no 510.

The appellant was dissatisfied with the decision and came to this court on appeal on grounds that

- 1. The learned Chairman erred in law and fact in failing to make a finding that the appellant was the owner of parcels 509 & 510 contrary to the provisions of the law.**
- 2. The learned Chairman erred in law and fact in failing to evaluate the entire evidence tendered by the appellant in proof of ownership of parcels 509 & 510 respectively.**
- 3. The learned Chairman erred in law and fact in placing weighty reliance to the evidence tendered by the respondent while ignoring that of the appellant contrary to the provisions of the law.**
- 4. The judgement was against the weight of the evidence offered before the tribunal**
- 5. The judgement is contrary to the law.**
- 6. The honourable tribunal lacked jurisdiction to hear and determine this matter.**

He prays that the court finds that the appellant is lawful and registered proprietor of parcels 509 & 510 and that the respondent's actions to allocate the aforementioned parcels to 3rd parties were dishonest and unlawful. That in the alternative, an order that the appellant be compensated for the fair and just price thereof or separate plots be allocated to him by the respondent.

I have considered the rival submissions and do find that the 1st issue for determination is whether the appeal was filed within time.

Section 81 of the co-operative Societies Act provides:

1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court: Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) Upon the hearing of an appeal under this section, the High Court may—(a)confirm, set aside or vary the order in question;(b)remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;(c)exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or(d)make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(3) The decision of the High Court on any appeal shall be final.

The appeal was filed on 18/6/2016 more than one year after the decision of the tribunal. The appellant did not comply with Section 81 of the Act. The suit was filed out of time.

The above position can determine the appeal instantly. However, since other issues have been raised, the 2nd issue is the Tribunal lacked Jurisdiction to here and determines the matter.

Section 76 of the Cooperative society Act provides that:

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.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demands admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

I do find that the appellant was a member of the cooperative society and therefore had the right to claim before the tribunal and therefore the tribunal had the Jurisdiction to entertain the claim.

I do uphold the decision by the tribunal that there was evidence of fraud since the Annual General Meeting of the responded found that there was fraud and that there had been fraudulent allocation of plots and therefore all allottees who were genuine member were required to file form C to assist in the authentication of allottees. The appellant did not fill the form C. He did not prove ownership and or legal acquisition of plot No. 509 as was required by the resolutions made by the respondent. I do further find that the appellant did not provide evidence on lawful acquisition of plot no. 510 and therefore the Tribunal properly found that he had not proved his claim. The upshot of the above is that the appeal is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED THIS 30th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE