



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 5 OF 2017

JOHN KASUKIAPPELLANT

VERSUS

MARY KAVATA MBUVI.....1ST RESPONDENT

LEONARD MUNYWOKI2ND RESPONDENT

(Being an Appeal from the Ruling of Principal Magistrate's Court

at Kithimani in Civil Case No. 84 of 2007 delivered on 25th February, 2016 by

Hon. M.A.O. Opanga, Senior Resident Magistrate)

JUDGMENT

1. In his Memorandum of Appeal, the Appellant has averred that the Honourable Magistrate erred in holding that she had jurisdiction to entertain the matter before her; that the learned Magistrate erred in failing to make a finding that the Plaintiff and the Defendants were members of a Co-operative Society and that the learned Magistrate erred by applying the wrong principles of law in reaching her decision.
2. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that the Plaintiff and the 1st Defendant are members of Muka Mukuu Co-operative Society; that in determining the preliminary objection viz-a-viz the provision of Section 76 of the Co-operative Act, the lower court limited its definition of the word "dispute" to what is provided for by Section 76(2) of the Act and that the Magistrate failed to appreciate that the current dispute fall within the purview of Section 76.
3. While relying on the cases of *Gatanga Coffee Growers Co-operative Society Limited vs. Gitau (1970) EA 361*; *Murata Farmers Sacco Society Limited vs. Co-operative Bank of Kenya, Nairobi HCCC No. 548 of 2001* among others, counsel submitted that the term "dispute" is not limited as described by the learned Magistrate.
4. The Appellant's advocate submitted that the dispute in the lower court should be determined by the Co-operative Tribunal and that both parties to the dispute enjoy membership in the Society. As at the time of writing this Judgment, the Respondents' submissions were not on record.
5. The suit in the lower court was commenced by way of a Complaint dated 27th March, 2007. In the Complaint, the current 1st Respondent averred that she is the registered proprietor of land known as 3-024 Muka Mukuu Farmers Co-operative Society Limited, having acquired the said land from her brother, Mr. Martin Muanga Mbuvi, who was the original owner of the land.
6. The Respondent alleged in the Complaint that the Appellant was a caretaker of the suit land and that when she acquired the suit property, she gave him notice to vacate the land. In her prayers, the 1st Respondent sought for an order of eviction of the Appellant from the suit property.
7. The Appellant filed a Notice of Preliminary Objection dated 26th June, 2015 in which he averred that the court lacks the jurisdiction to hear and determine the current suit in view of Section 76 of the Co-operative Society's Act and that the suit is incompetent.
8. In his Ruling of 25th February, 2016, the learned Magistrate held as follows:

"I have looked at the provisions of Section 76 of the Co-operative Societies Act and note that Section 76(2) gives an explanation as to what a dispute referred to in Section 76(1) includes and which is restricted to a claim by a Co-operative Society for any debt or demand due to it from a member, a past member, nominee or personal representative for any debt or demand due from a Co-

operative Society or a claim by a Sacco Society against a refusal to grant or a revocation of licence or any other due. In light of the authorities cited and the scenario envisaged above, it is my considered view that Section 76 of the Co-operative Society Act is only restricted to disputes described in Section 76(2) and which are between the members, past members, their nominees and the Co-operative Society.”

9. It is the above holding by the court that the Appellant is aggrieved about. According to the Appellant, the learned Magistrate should have held that it is the Co-operative Tribunal that has jurisdiction to issue the orders prayed for in the Plaint, and not the court.

10. In *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1* Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

11. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR* expressed itself as follows:

*“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, 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.”*

12. From the above decisions, it is trite that the jurisdiction of a Court, Tribunal or anybody exercising quasi-judicial or public functions flows from the Constitution or legislation or both.

13. Section 76(1) and (2) of the Co-operative Societies Act 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.*

(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 demand is 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.”*

14. From the Plaint and the Defence, there is no indication to suggest that the Appellant herein is a member, a former member, or was a person claiming through a member, past member or a deceased member of the suit property.

15. Indeed, while the 1st Respondent alleged that the Appellant was just a caretaker, in the Defence, the Appellant did not state in which capacity he was claiming the suit land. On that ground alone, any dispute between the Plaintiff and the Defendants in the lower court could

not have been referred to the Tribunal under the provisions of Section 76(1) and (2) of the Act.

16. Even if the Appellant herein was a member, a former member, or claiming the land through a former or deceased member of Muka Mukuu Co-operative Society, I am of the same view, like the learned Magistrate, that disputes relating to ownership, use and occupation of land cannot be dealt by the Co-operative Tribunal.

17. As correctly noted by the learned Magistrate, Section 76(2) of the Act explains the kind of a dispute that the Tribunal has the mandate over, which is a claim for “*any debt or demand due*”. A claim for land cannot be “*a debt or demand*” contemplated under the Act.

18. This is the position that the court took in the case of *Toratio Nyanga’u & 4 Others vs. Lietego FCS Limited (2011) eKLR* where it was held as follows:

“In its effort to resolve the matter the Tribunal attempted to define the term “dispute.” That is where, in my view, it started erring. The operative word in that section is “business”. So the Tribunal should have first determined whether or not the dispute before it concerned the “business” of the respondent society... Although we are not told what the respondent society was established to do, I am, however, certain that resolving its land disputes with third parties whether or not they are its members cannot have been one of the businesses of the respondent society. In the circumstances the land ownership dispute in this case did not fall within the purview of Section 76 of the Societies Act and the Tribunal had therefore no jurisdiction to entertain the matter.”

19. It is trite that the only organs authorized by the Constitution and the statutes to hear disputes concerning the use and occupation of, and title to land, is the Environment and Land Court and the Magistrate’s Court. That mandate is provided under Article 162(2) (b) of the Constitution, Section 13(1) of the Environment and Land Court Act and Section 9 (a) of the Magistrates’ Act.

20. That being the case, I am in agreement with the decision of the learned Magistrate that the Co-operative Tribunal does not have the requisite jurisdiction to handle the dispute between the Appellant and the Respondents. Consequently, the Appeal is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE