



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

MISC ELC NO 231 OF 2013

MURIU MWANGI NGABIA.....PLAINTIFF

VERSUS

SALOME WANGUI MWANGI.....1ST DEFENDANT

JOHN IRUNGU MAINA.....2ND DEFENDANT

RULING

(Miscellaneous application seeking adoption of a decision of a Cooperatives Officer; whether such officer had jurisdiction to hear the dispute; whether court can adopt such award; no jurisdiction demonstrated on Cooperatives officer; provisions of the law cited not covering the issues at hand; application dismissed with costs)

This suit was commenced by way of a Miscellaneous Application said to be brought under the provisions of Section 74 of the Co-operative Societies Act (CAP 490) Laws of Kenya, Section 3A of the Civil Procedure Act, and other enabling provisions of the law. The application seeks the following orders :-

- 1. That this Honourable Court be pleased to adopt the award of the District Co-operative Officer/Liquidator Kento Kijabe FCS Award issued on 12th September 2012.*
- 2. That the costs of this application be provided for.*

The application is based on the grounds :-

- 1. That the award herein was read to the parties on 12th September 2012.*
- 2. That any party aggrieved by the said award had 30 days in which to appeal.*
- 3. That none of the parties has appealed against the said award and thus this application.*
- 4. That it is law that upon such award being read to the parties and upon the same being filed in court and on application by either party the same shall be adopted as judgment of the court (sic).*
- 5. That it is only fair and just that the said award be adopted as judgment of the Court to enable the applicants herein draw an executable decree thereon.*

6. *That it is only prudent and just that this Honourable Court do grant the orders prayed for.*

The application is supported by an affidavit sworn by Joseph Muriu Muriu. In the supporting affidavit, the applicant has stated that he is one of the holders of a power of attorney donated by the applicant and that he has authority from the other three to swear the affidavit; that the subject award was read to the parties on 12th September 2012; that any aggrieved party had 30 days to appeal; that no appeal has been filed; that they had filed another application before the Chief Magistrate's Court which was withdrawn for want of jurisdiction; and that the said award needs to be adopted as a judgment of the court. The said award is annexed to the supporting affidavit. There is also annexed a general power of attorney, registered on 30 April 2013, the donor being Muriu Mwangi Ngabia, and the donees being his wife Joyce Nyambura Muriu, and his sons, Francis Mwangi Muriu, Joseph Muiru Muriu, and Paul Ngugi Muriu.

The application is opposed by the 1st defendant who filed a Notice of Preliminary Objection and a Replying Affidavit. The Notice of Preliminary Objection raises four grounds being:-

- 1. That the applicant is non suited as the dispute involved the plaintiff and her late husband and no substitution of parties has ever been done to bring her formally into the proceedings in the place of her late husband Francis Mwangi Maina.*
- 2. The decision of the District Cooperative Officer and Liquidator is not a decision of a Tribunal to be referred to the High Court as envisaged under Section 77 of the Cooperatives Act (Amended) hence no proceedings before the court for consideration.*
- 3. There was no complainant before the liquidator/cooperative officer as at the date of purported hearing as the alleged power of attorney was registered on 30/4/2013 and the proceedings and "ruling" sought to be adopted wound up on 12/9/2012.*
- 4. The plaintiff is in defiance of a valid court decree to pay costs of Kshs. 30,450/= as ordered by the Chief Magistrate's Court (Misc. No. 1 of 2012) which involves exactly the same parties and cause of action which was dismissed (not withdrawn) for lack of jurisdiction.*

In the Replying Affidavit, the 1st respondent has averred that the deponent of the supporting affidavit is a stranger to these proceedings; that the power of attorney is doubted, since the lawyer who purportedly drew it (who happens to be the current advocate of the 1st respondent), has intimated to her that he never had such a document registered; that she is wife of Francis Mwangi Maina who is deceased and she has wondered in what capacity she has been sued since she is not the registered title holder; that the applicant has previously filed incompetent proceedings that were dismissed; that the proceedings sought to be adopted are of an incompetent body which attempted to usurp the functions of the Cooperative Tribunal; that the land in issue has a valid title and that the procedure followed herein is not the proper one to invalidate a title.

In response to the replying affidavit, the applicant filed a further affidavit. It is stated that the power of attorney shows that it is clearly registered; that the 1st respondent being wife of Francis Mwangi Maina is the legitimate heir and heir apparent of his estate, and in any event, the property is jointly registered with John Irungu Maina, who is the 2nd respondent, and therefore there is nothing wrong in having her as a party; that the previous suit before the Magistrate's court was actually withdrawn and not dismissed.

The 2nd defendant only entered appearance but did not reply to the application.

In their submissions, M/s Gachiengo Gitau & Company Advocates, for the respondents, submitted inter alia that Section 74 of the Cooperative Societies Act is inapplicable as it only addresses appeals on orders of surcharge. Counsel submitted that the genesis of the dispute did not involve the 1st respondent, but her deceased husband, and that due process was not followed to bring the 1st respondent into these proceedings by any process of succession, and that the liquidator assumed that a widow could completely and automatically take over her deceased husband's liabilities or court cases. The power of attorney is also discredited. He submitted that a tribunal merely made recommendations based on powers that it did

not have (that is, cancellation of titles). He further submitted that a Tribunal under Section 77 of the Cooperatives Act does not envisage the group which made the subject decision. He stated that what heard the dispute was not a Tribunal under the Act, but a mere ad hoc committee co-chaired by a District Cooperatives Officer/Liquidator and a Liquidation Secretary. He submitted that the Court cannot revive an "award" from an incompetent "tribunal". He also addressed the issue of withdrawal/dismissal of the matter previously filed in the Magistrate's Court.

Mr. J.I. Mwangi for the applicants entirely relied on the supporting and further affidavits. He submitted that the respondents participated in the proceedings before the District Cooperative Officer and evidence was adduced. He stated that they agreed to subject themselves to the Tribunal and they cannot now be heard to say that the tribunal was not competent. He submitted that the Constitution encourages Alternative Dispute Resolution mechanisms (ADR) and it was within the constitutional right of the applicants to seek the subject proceedings. He submitted that in the absence of complaints of bias by the arbitrator, the award should be upheld.

I have considered the matter.

The dispute was heard by two persons, namely, Mr. N.M. Omari the District Co-operative Officer/Liquidator Kenton Kijabe Farmers Cooperative Society and S.K. Gicheha the Liquidation Secretary Member Land Dispute Committee. It appears to me that they were of the view that they were exercising powers given to them by Section 66 of the Cooperative Societies Act.

I have looked at the proceedings which the applicant wishes this court to adopt. From what I can see, the "complainant" was one Muriu Mwangi Ngabia. The "defendants" were Francis Mwangi Maina (deceased) represented by wife Salome Wangui Mwangi. It is not very easy to determine what the dispute was and in fact it is not easy to follow the flow of the "award". But from what I can gather, there seems to have been an issue revolving around ownership of a share presumably of Kenton Kijabe Farmes Co-operative Society. The share allowed one to ballot for land. The decision made was that the deceased Francis Mwangi Maina, tampered with the share certificate NO. 520 by deleting the name of the rightful "incumbent" Muriu Mwangi Ngabia. I have seen three land parcels mentioned, that is , Longonot/Kijabe Block 3/1132, Longonot/Kijabe Block 3/ 323 and Longonot/Kijabe Block 3/1855. It is said that the "defendants" perpetrated a fraud so as to give the title deed to the latter two parcels to Francis Maina and John Irungu Maina respectively. After hearing the dispute they made the following recommendations , that :

The Honourable High Court of Kenya, Nakuru is requested to cancel the existing title deeds Nos. Longonot/Kijabe Block 3/1132, Longonot/ Kijabe Block 3/1855, and issue a court order for the complainant Mr. Muriu Mwangi Ngabia ID No. 4665953 to be issued with title deed Nos. Longonot/Kijabe Block 3/1132 and Longonot/Kijabe Block 3/1855.

The award was signed on 12 September 2012.

I have looked at the Cooperative Societies Act. As I stated earlier, the two persons who made the "award" thought that they were acting under Section 66 of the Cooperative Societies Act. I think it is prudent that I set it out. It is drawn as follows :-

Powers of liquidator

(1) The liquidator shall, subject to this Act, have the following powers—

(a) to appoint a day, in the prescribed manner, before which the creditors whose claims are not already recorded in the books of the co-operative society shall state their claims for admission, or be excluded from any distribution made before they have proved them;

(b) to institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as, litigant in person on behalf of the

society;

(c) to appoint an advocate to assist him in the performance of his duties;

(d) to refer disputes to the Tribunal in the prescribed manner;

(e) to determine from time to time the contributions to be made by the members and past members, and by the estates of deceased members of the society, to the funds of the society;

(f) to investigate all claims against the society, and subject to this Act, to decide questions of priority arising between claimants;

(g) to call such meeting of members and creditors as may be necessary for the proper conduct of the liquidation;

(h) to sell the movable and immovable property and rights of action of the society, by public auction or private contract with power to transfer the whole thereof to any person or company or to transfer the same in parcels;

(i) to carry on the business of the society as far as may be necessary for the proper liquidation of the affairs of the society;

(j) to determine, from time to time, by what persons and in what proportion the expenses of the liquidation are to be borne;

(k) to take possession of the books, documents and assets of the society;

(l) to arrange for the distribution of the assets of the society in a convenient manner when a scheme of distribution has been approved by the Commissioner;

(m) to give such directions in regard to the disposal of the books and documents of the society as may appear to him to be necessary for winding up the affairs of the society;

(n) to compromise, with the approval of the Commissioner, any claim by, or against, the society;

(o) to apply to the Commissioner for his discharge from the duties of liquidator after completion of the liquidation proceedings.

(2) The liquidator shall have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and so far as may be necessary, in the same manner as is provided in the case of a court under the Civil Procedure Act (Cap. 21), in so far as such powers are necessary for carrying out the purposes of this section.

The Cooperative Societies Act, is the statute that allows for the establishment of cooperative societies. It may happen that a cooperative society needs to be wound up and that is where the Liquidator comes in. His powers are as I have displayed above. I cannot see any mandate vested upon him to hear land disputes between members. In some cases, he may refer some disputes to the Tribunal, which is the Cooperative Tribunal, established by Section 77 of the statute and its mandate is to hear the following disputes :-

(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.*

It will be observed that first; the liquidator of a Cooperative Society has no power to hear any dispute touching on ownership of land. The ownership of land which has title and is owned by a member is also not among the disputes

that can be referred to the Cooperative Tribunal. It is therefore clear to me that the two officers who heard the dispute and made the determination, had no powers to do so. Their decision has no legs to stand on. It is at best a non binding mediation and this court is not obliged to adopt such an "award". It matters not that the parties subjected them to the process. Mere subjection of oneself to a process of dispute settlement which is non binding, does not impose on one an obligation to obey the decision therein.

The application as drawn stated that it is inter alia brought under the provisions of Section 74 of the Cooperative Societies Act. I have looked at that provision which states as follows :-

S. 74 Appeal against order

(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.

Section 73 cited in Section 74 above, gives the Commissioner of Cooperatives power to surcharge a member who has misappropriated funds or the property of a cooperative.

The "award" herein is not that of the Commissioner and neither is it that of the Tribunal. It is an award made by two individuals who were neither the Commissioner of Cooperatives nor the Tribunal created by the statute. I am unable to see how Section 74 of the Cooperative Societies Act is applicable to the circumstances of this case.

The power to hear disputes over land is vested upon the Environment and Land Court by dint of Article 162 (2) (b) of the Constitution, Section 150 Of the Land Act, Act No. 6 of 2012, and Section 101 Of the Land Registration Act, Act No. 3 of 2012. If the plaintiffs feel that they need to have a title cancelled, that is the forum they should approach for redress.

There are many other issues raised but I do not see the necessity of addressing all of them. It is clear to me that the cooperatives officers had no jurisdiction to hear the dispute herein. The upshot of the foregoing is that this suit

has no merit. It is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered in open Court at Nakuru this 11th day of February 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of:-

Mr. Ikuu holding brief for Mr Irungu Mwangi for applicants.

Ms Njeri Muiruri holding brief for Mr Gachiengo Gitau for respondent

Emmanuel Maelo: Court Assistant