



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 224 of 2000

DANIEL KALOKI KIOKO 1ST PLAINTIFF/APPLICANT

GRACE MUTAVE MASAI 2ND PLAINTIFF/APPLICANT

VERSUS

WILLY MUASYA KIOKO DEFENDANT/RESPONDENT

RULING

1. The 1st Plaintiff's Application dated 3/2/2009 seeks orders under Orders VIA Rule 3, XLVIII Rule 5 of the Civil Procedure Rules that the name of the 2nd Defendant, Grace Mutave Masai be removed from the proceedings herein for reasons that she died on 22/7/2007 and that the 1st Plaintiff do proceed with the suit. Before it could be heard, however, the Defendant, Willy Muasa Kioko raised an objection and in it, he stated as follows;-

1. "That the said application is incompetent bad in law and incurably defective in that;-

(a)The suit against the plaintiff has already abated and therefore no suit is in existence.

(b)This court has no jurisdiction vide section 76 (1) of the Co-operative Society Act entertain to the matter.

(c) The application for amendment is made in bad faith and intended to plead a new cause of action and give this court jurisdiction which is wanting.

(d)The suit challenges a first registration which is indefeasible."

2 In response thereto, the 1st Plaintiff's advocate argued that;

Firstly, Section 76 (1) of the Co-operative Societies Act relates to disputes between members of a Co-operative Society *inter alia* and the Plaintiffs were not members of the Lukenya Ranching Co-operative Society. That therefore they would not have been allowed audience by the Co-operative Societies Tribunal.

Secondly, that in his Statement of Defence, the Defendant admitted the jurisdiction of this court and is now bound by that pleading.

Lastly, that the issues being raised were conclusively determined by Mwera J and cannot now be contested.

3. For my part, I have seen the Plaintiff dated 11/12/2000. In it, the Plaintiffs claim that they were suing as the son and widow of the late John Masai Kioko who was allegedly in joint ownership, with the defendant, of share number 724 in Lukenya Ranching and Farming Co-operative Society which share was later converted into land and there have been three allotments of plots from the said land to the shareholders i.e Kioko and the defendants and the estate of the late John Masai Kioko inclusive. One of the orders thereafter sought was an order that the Defendant be compelled to share/divide the 20 acres plot in which he resides, with the administrators of the estate of the deceased i.e. John Masai Kioko aforesaid.

4. The Defendant in his Statement of Defence dated 8/8/2002 denied the claim and averred that the “**share mentioned in paragraph 5**” of the Plaintiff was his private and exclusive property and so were all the lands allotted to him by Lukenya Ranching and Farming Co-operative Society Ltd. He admitted that this court had the jurisdiction to determine the dispute but averred further that no cause of action had been disclosed and he prayed that the suit be struck off with costs.

5. From the above facts, it cannot be contested that the deceased, John Masai Kioko (through his administrators) and the Defendant, separately claimed a share of/or the whole of share No.724 at Lukenya Ranching and Farming Co-operative Society Ltd respectively. Section 76 (1) of the Co-operative Societies Act provides as follows:-

“76. (1) If any dispute concerning the business of any 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;**

shall be referred to the Tribunal.”

6. If that is the law, then it is my view that Section 76 (1) (a) properly applies to the dispute before me and the proper forum to determine it is before the Tribunal set up under the Co-operative Societies Act. That being my categorical finding, there is nothing more to say as where jurisdiction is wanting all other issues cannot have any meaning.

7. The suit is consequently struck off without any order as to costs and parties should file a claim before the Co-operative Societies Tribunal subject to limitation, if at all.

8. Orders accordingly.

Dated and delivered at Machakos this 1st day of July 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Nduva for Respondent

N/A for Applicant

ISAAC LENAOLA

JUDGE