



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, OMOLO & SHAH, JJ.A)
CIVIL APPEAL NO. 290 OF 1997
BETWEEN

NDIMO FARMERS CO-OPERATIVE SOCIETY LIMITEDAPPELLANT

AND

SAMUEL WACHIRA & OTHERSRESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Mr Justice N. Dugdale) dated 4th October, 1994

in

H.C.MISC.APPL. NO. 192 OF 1984)

JUDGMENT OF THE COURT

We are of the very clear view that this appeal must be allowed. Someone called Samuel Wachira who alleged he was acting on behalf of members of Ndimo Farmers Co-operative Society Limited applied to the High Court under the provisions of Order 53 for orders of the prohibition and mandamus against the Commissioner of Co-operative Development. The orders sought were that:

- (1)an order of mandamus to compel the Commissioner of Co-operative Development to implement certain recommendations in an inquiry report which had been made in 1982;***
- (2)an order of prohibition be issued to stop the same Commissioner from sub-dividing some land owned by Ndimo Farmers Co-operative Society;***
- (3)an order that voting or balloting so far done [by Ndimo] or to be done were null and void;***
- (4)an order that the Commissioner be directed to supervise fresh balloting and voting in accordance with the inquiry report;***
- (5)an order that the management committee do give account of the Society since 1978.***

while these orders were sought against the Commissioner, it is abundantly clear to us that it was the management committee of Ndimo against whom Wachira was proceeding. We do not know, assuming that the orders had been granted, how the Commissioner of Co-operatives would have been able to compel Ndimo to comply with the orders.

Be that as it may, the matter was referred to arbitration by a representative of the Commissioner. That must have been under the provisions of section 80 of the Co-operative Societies Act, Cap 490 of the Laws of Kenya. It is not clear to us what the Terms of the award were, but judgment was entered in Terms of the award and a decree drawn . There then followed a notice of motion purportedly filed under the provisions of sections 3A, 33, 34 , 38 (f) and 63(c) of the Civil Procedure Act, and under section 143 of the Registered Land Act. That motion purported to call upon some 281 people, apparently members of Ndimu, to show cause why their titles to the lands allocated to them by Ndimu should not be cancelled. When that motion came before Dugdale, J (as he then was) he actually cancelled the titles though the owners of the titles had not been made parties to the dispute. Mr Mundia for the respondents now tells us that the notice of motion brought under Order 53 was a representative action. We do not know how the Commissioner of Co-operative Development could have been a representative of members of Ndimu. Again even assuming, without deciding, that the provisions of Order 1 Rule 8 of the Civil Procedure Rules could apply to a motion under Order 53, Mr Mundia agrees there was no compliance with Order 1 Rule 8 Nor is there any evidence that the 281 persons had been served under Order 53 Rule 3(2) ; or that they were heard in accordance with Rule 6 of the Order. It appears to us that the whole suit was misconceived right from the very beginning and the titles of the individual members of the Ndimu ought not to have been summarily cancelled in the manner Dugdale, J purported to do. Section 143 of the Registered Land Act deals with rectification of the register where fraud in registration other than a first registration is involved. Nobody ever alleged fraud against the individual members of Ndimu. We allow this appeal, set aside all the orders made by the superior court and substitute them with an Order dismissing the notice of motion filed under Order 53 of the Civil Procedure Rules. We make no order as to costs of the appeal and of the proceedings in the High Court.

Dated and delivered at Nairobi this 8th day of July, 1998.

R. O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR