



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 72 OF 2018

MWEU NDAKA NZUMA (Legal representative of the estate of

NDAKA NZUMA (Deceased)PLAINTIFF

VERSUS

AGNES MWELU MUOKI

NATHAN MAKUNDI MUOKI (Legal representatives of the

Estate of PETER MUOKI NDAKA (Deceased).....DEFENDANTS

RULING

1) What is before this court for ruling is the Defendants' notice of preliminary objection dated 25th May, 2017 and filed in court on even date. The Defendants contend that;

- 1. That the entire suit offends the mandatory provisions of the law in particular Section 76 of the Co-operative Society's Act.**
- 2. That the honourable court has no jurisdiction to hear and determine this suit in view of the provisions of the Co-operative Societies Act Rule, and the registered by-laws of the society.**
- 3. That the suit does not fall within the purview of the E.L.C.**
- 4. That the orders sought cannot be against the 1st and 2nd Defendants.**
- 5. That the entire suit is defective and an abuse of the court process and the same should be dismissed with costs.**

2) Mr. Orina for the Defendants condensed the five grounds in the notice of preliminary objection into one, namely jurisdiction. He submitted that the issue before this court involves share membership in Konzo Co-operative Society Ranching and Farming Co-operative Societies Ltd. He pointed out under Section 76 of the Co-operative Societies Act, it is provided that if any dispute concerning the business of a co-operative society arises among members, past members and persons claiming through members, past members and deceased members, it shall be referred to the Tribunal. The counsel submitted that the rightful court to dispose off the dispute of share membership is the Co-operative Tribunal and not this court. The counsel cited the case of Charles Keragita Arwenya V Nyakoe Farmers Co-operative Society Ltd [2016]e KLR where J.R Karanjah, J stated thus;

“S. 76 of the Co-operative Societies Act provides that any dispute concerning the business of a Co-operative Society and arising among members of a society or between members and the society or its committee or any officer of the society shall be referred to the Co-operative Tribunal and under S.81 (1) of the Act, any party aggrieved by the order of the tribunal may appeal to the High Court. It would therefore appear that S.76 of the Act ousts the jurisdiction of the High Court in exercising original jurisdiction in disputes involving Co-operative Societies and its members. The only jurisdiction open to the High Court in such matter would be the appellate jurisdiction only.”

3) Mr. Orina further cited the case of Speaker of the National assembly v James Njenga Karume [1992] eKLR where the court of Appeal states thus;

“... there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed.”

4) Arising from the above, the counsel submitted that the legislative intended the Co-operative Tribunal to be the first level of resolution of disputes arising from Co-operative Societies with appeal lying in the High Court. The counsel pointed out of parties were permitted to lodge claims covered by Section 76 of the Co-operative Societies Act to the High Court, this will deny them their day in the High Court at the appellate level and submitted that this position was upheld in the case of ***Bernard Mugo & others V Kagaani South Farmer Co-operative Society & 4 others [2015] eKLR*** where F, Muchemi, J stated thus:-

“ it is imperative to note that decisions of the Co-operatives Tribunal are appealable to the High Court which is the final court on that category. Matters which the court has jurisdiction other than those included in the act may be heard in the High Court and follow the laid down process for appeal. The need to seek justice in the right forum cannot therefore be overemphasized.”

5) The counsel urged the court to refer this matter to the Co-operative Tribunal to enable parties resolve their dispute in the right forum.

6) On the other hand, the counsel for the Plaintiff submitted that the Plaintiff prays for declaratory order and nullification of a title deed issued by the ministry of lands for want of letters of administration. The counsel was of the view that given those circumstances, the Plaintiff's claim does not fall under Section 76 of the Co-operative Societies Act nor it is envisaged under Section 76(2) of the same Act. The counsel went on to submit that the court is fully seized with original jurisdiction to determine the dispute herein. The counsel urged the court to dismiss the preliminary objection with costs.

7) I have read the submissions that were filed by the counsel on record for the parties herein. Since the notice of preliminary objection revolves around the issue of jurisdiction, it is important to look at Section 76(1) of the Co-operative Societies Act [Rev 2012] Chapter 486 of the Laws of Kenya.

It provides as follows:-

Section 76(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.**

8) I have looked at the pleadings herein. It is clear the Plaintiff herein seeks a declaration that transfer of membership number 391 Konza Ranching and Farming Co-operative Society Limited through which certain parcels of land was made from the estate of Ndaka Nzuma (deceased) to Peter Muoki Ndaka(deceased) is null and void. It is therefore clear to me that the Plaintiff herein claims share that was held by a deceased person and which share he alleges that it was unprocedurally transferred to Peter Muoki Ndaka (deceased). The dispute herein therefore clearly falls within the ambit of Section 76 (1) (a) of the Co-operatives Societies Act aforementioned.

9) It is clear that there is a procedure that offers redress the grievance for that Plaintiff herein has raised. He must follow that laid down procedure (*see the speaker of the National Assembly V James Njenga Karume[1992] eKLR.*)

10) The Plaintiff can only approach this court by way of an appeal from the decision of the Co-operative Tribunal (*see Bernard Mugo & Others Kaaqari South Farmers Co-operative Society & 4 others [2015] eKLR.*)

11) In the circumstances, my finding is that the preliminary objection has merits. I, therefore, uphold it and proceed to struck out the Plaintiff's suit with costs to the Defendants.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 21ST DAY OF JANUARY, 2019.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Mr. Orina Riech for the Defendant

Mr. Nagwere holding brief for Mr. Kamolo for the Plaintiff.

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

21/1/2019