



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 135 OF 2018**

**DONALD WAMBUA ALBERT MUTYAUVYU.....PLAINTIFF**

**VERSUS**

**MUKA MUKUU FARMERS CO-OPERATIVE SOCIETY LIMITED....DEFENDANT**

**RULING**

1. This Ruling is in respect of the Plaintiff's Notice of Motion dated 12<sup>th</sup> June, 2018 and the Defendant's Notice of Preliminary Objection dated 3<sup>rd</sup> October, 2018. In the Notice of Motion dated 12<sup>th</sup> June, 2018, the Plaintiff is seeking for the following orders:

***a. That the Defendant be restrained either by itself or through its agents, servants, employees or any one acting on its behalf from invading, encroaching, working on, constructing on, using, alienating or in any other way interfering the Plaintiff's quiet possession of all those parcels of land known as plot numbers 199, 186 (part), 114, 17, 8, 167, 26, 116, 2, 103A, 47, 69, 93, 79, 197, 94, 130, 32, 163, 98, 56, 140, 90, 80, 44, 154, 131, 55, 20, 44A, 41, 60, 19, 724, 57, 177, 129, 189, 138, 195, 37, 134, 872, 13, 5A, 128, 63, 127, 267, 266, 249, 250, 230, 229, 224, 223 and 223A of its L.R Number 10967 until hearing and determination of this suit***

***b. That the Defendants do pay costs of this Application.***

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he has been a member of the Defendant since 1995 when he purchased sixteen (16) shares from the Defendant; that by virtue of being a member, one is entitled to the Defendant's land equal or commensurate to his contribution and that the Defendant's members were entitled to land measuring 1.2 acres per share.

3. It is the Plaintiff's case that on 23<sup>rd</sup> November, 1995, the members of the Defendant balloted for the plots and that he participated in the balloting and picked plot numbers 20, 55, 63, 79, 80, 93, 94, 127, 128, 129, 130, 131, 156, 163, 177 and 189.

4. The Plaintiff deponed that in addition to the sixteen (16) shares he held in the Defendant, he also purchased plots from other members with the consent of the Defendant and that he was issued with the beacon certificates for some of the plots.

5. When the consolidation of the plots became problematic, the Plaintiff deponed that the Defendant allowed members to choose their preferred areas; that he choose a rocky and hilly area and that the Defendant had agreed to give additional 5 plots to any member who agreed to choose a rocky and un arable area. It is the Plaintiff's case that having chosen a rocky area, he was entitled to an additional 5 shares which was equivalent to 6 acres.

6. The Plaintiff deponed that the Defendant allowed him to settle in the area he had chosen which was equivalent to 68.4 acres; that he established his home on the said land and that despite the Defendant having given its consent and received money in respect to the transaction, the current leadership of the Defendant now wants to take away his plots.

7. The Plaintiff deponed that the Defendant has instructed its Surveyors to show Mr. Mathews Kiriago Nyaaga Plot No. 27 and 114 despite knowing that his house stands on Plot No. 114; that the Defendant's purported fresh allocation of the plots will completely interfere with the development of his plots and that the Defendant has threatened not to include his name in the register to be forwarded to the Land Registry for purposes of processing the Title Deeds.

8. The Plaintiff finally deponed that he has been in occupation of the suit land since 1995 and that the Defendant's actions are not justified as there is no member who has come forward claiming the suit properties.

9. In response to the Application and the suit, the Defendant filed a Notice of Preliminary Objection in which it averred that this court lacks jurisdiction to hear and determine the issues raised in the suit.

10. In his Replying Affidavit, the Defendant's Vice-Chairman deponed that from their records, the Plaintiff only owns 18 plots being Plot Nos. 63, 177, 189, 55, 163, 129, 128, 94, 259, 156, 119, 80, 175, 199, 135, 132 and 41 each measuring 1.2 acres; that the rest of the plots belong to other family members and that the Plaintiff is using the court process to grab the Defendant's members' rightful entitlement.

11. The Plaintiff's advocate submitted that the Defendant is a land buying company; that there is no certainty that the Defendant is a Co-operative Society and that the cause of action herein relates to ownership and occupation of the suit land.

12. Counsel submitted that the Plaintiff has not claimed that the Defendant owes him any debt; that the claim herein is about use and title of the Plaintiff's land which he acquired in a lawful manner and that this is not one of the disputes contemplated under the Co-operative Societies Act.

13. The Plaintiff's advocate submitted that the Plaintiff purchased the suit plots; that the Defendant has been manipulating and changing the ground plan and the numbering of plots and that the Plaintiff has chronologically showed how he acquired all his plots.

14. The Defendant's advocate submitted that pursuant to the provisions of Section 76 of the Co-operative Society Act, it is the Tribunal that has jurisdiction to entertain the current dispute and that the suit should be struck out.

15. The Defendant submitted that the Applicant has failed to prove that he has a reasonable cause of action; that the Plaintiff only owns 18 plots and that no one has interfered with those 18 plots. Because the Plaintiff has his own plots, the Defendant's counsel submitted that the Plaintiff will not suffer any irreparable injury that cannot be compensated if the injunctive order is not granted.

16. In the Plaintiff's Notice of Motion dated 12<sup>th</sup> June, 2018, the Plaintiff has described the Defendant as a land buying company, whose members are entitled to land commensurate to their shareholding in the company. According to the Plaintiff, one share in the Defendant's company was commensurate with land measuring 1.2 acres, and that as at 23<sup>rd</sup> November, 1995, he was entitled to sixteen (16) shares which translated into 16 plots of 1.2 acres.

17. In addition to the 16 plots which the Plaintiff listed in his Affidavit, the Plaintiff averred that he purchased a further 36 plots from different members of the Defendant. The Plaintiff has enumerated the names of all the people he purportedly purchased the 36 plots from.

18. The first issue that the court is supposed to deal with is whether this court has the requisite jurisdiction to deal with the suit.

19. The Section conferring jurisdiction on the Tribunal is Section 76 of the Co-operative Societies Act (*the Act*). Subsection 2 of the Act defines a dispute as follows:

***“(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.”***

20. The Plaintiff has not claimed that the Defendant owes him any debt, neither does the Plaintiff owe the Defendant any debt. The claim by the Plaintiff is about the use and title of the suit's land. Some of the land that the Plaintiff is claiming is what he purportedly acquired directly from the Defendant by virtue of being a member of the Defendant and what he bought from the Defendant's members. Those members are not contesting the Plaintiff's claim.

21. To the extent that the Plaintiff is claiming for land which it purports it owns, it's only this court that has jurisdiction to hear the dispute. Indeed, the Tribunal does not have jurisdiction to deal with a dispute relating to the use, occupation and title to land as suggested by the Defendant. Any dispute relating to the use, occupation and title to land can only be determined by this court and the Magistrate's court, and not by any other court or Tribunal. The Defendant's Notice to Preliminary Objection dated 3<sup>rd</sup> October, 2018 is therefore dismissed.

22. In his Affidavit, the Plaintiff has shown how he purportedly acquired the suit properties. According to the Plaintiff, he first acquired 16 plots by virtue of his membership in the Defendant. The 16 plots he has listed include plot number 114 where he says he has put up his home. That plot seems not to be one of the 18 plots which the Defendant says the Plaintiff is entitled to.

23. Although the Defendant has exhibited a list of the 18 plots that the Plaintiff is entitled to, it has not exhibited a list of all its members and their entitlement. Indeed, considering that the Plaintiff has deponed that he bought 36 plots from the Defendant's members, the Defendant should have exhibited the entire register to enable the court ascertain the land that each member is entitled to. Such a register would also go along way to show if indeed the people listed in the Plaintiff's list as having sold to him the suit land were indeed members of the Defendant.

24. If it is true that the parcel of land that the Plaintiff is claiming belong to the other members of the Defendant, then it behoves the Defendant to enjoin those members in this suit. Having failed to do so, I find that the Plaintiff has established a prima facie case with chances of success. Indeed, considering that it is the Plaintiff who is in possession of the suit land, and not any other member of the Defendant, the Plaintiff will suffer irreparable injury that cannot be compensated in damages if the injunctive order is not granted.

25. For those reasons, I allow the Plaintiff's Application dated 12<sup>th</sup> June, 2018 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**