



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 54(A) OF 2018

SUSAN KAKUSI K. KILUNDO alias

KASISI KATUNGA KILUNDO PLAINTIFF

VERSUS

JAMES MWALILI SILADEFENDANT

KONZA RANCHING & FARMING

CO-OPERATIVE SOCIETY LTD.....THIRD PARTY

R U L I N G

1. What is before this court for ruling is the Third Party's Notice of Preliminary Objection dated 31st August, 2018 and filed in court on 03rd September, 2018. It is premised on the grounds:-

- 1) THAT the Honourable Court has no jurisdiction to hear and determine this suit in view of the provisions of Sections 13, 27(1), 76, 77 and 81 of the Co-operative Societies Act, Rule 6 of the Co-operative Societies Rules and paragraph 53 of the registered By-laws of the Society.**
- 2) THAT the suit does not fall within the purview of the Environment and Land Court.**
- 3) THAT the leave sought by the Defendant is an abuse of the court process since this Honourable Court lacks jurisdiction.**
- 4) THAT the said suit is an abuse of the court process and should be dismissed with costs.**

2. On the 19th November, 2018, the court directed that the Preliminary Objection be disposed off by way of written submissions. Pursuant to the aforementioned direction, the Third Party filed their submissions on 17th December, 2018 while the Defendant and the Plaintiff filed theirs on 21st January, 2019.

3. The brief facts of this case are as summarized by the Third Party as follows:-

“The Plaintiff herein filed a plaint dated 19th May 2018 and the same was filed on 22nd May 2018 seeking an order of eviction against the Defendant, his agents, servants and/or employees and the same be executed by the court bailiff/auctioneer and the OCS Salama Police Station to provide security. She also seeks a permanent injunction restraining the Defendant, his agents, servants and/or employees from trespassing onto her parcel of land known as Agricultural Plot Number 7 Malili situated within Konza Ranch and loss of user.

The Defendant filed a Chamber Summons application dated 16th August 2018 seeking leave to serve a Third Party Notice to the third party herein. The Third Party filed a Notice of Preliminary Objection dated 31st August 2018 on grounds that this Honourable Court lacks jurisdiction to hear and determine this suit in view of the provisions of Sections 13, 27(1), 76, 77 and 81 of the Co-operative Societies Act, Rule 6 of the Co-operative Societies Rules and paragraph 53 of the Registered By-laws of the third party. The Third Party also states that this suit does not fall within the purview of the Environment and Land Court and that the leave sought by the Defendant is an abuse of the court process since this Honourable Court lacks jurisdiction.”

4. The Counsel for the Third Party submitted that this court lacks jurisdiction to hear and determine this suit in that the issue before the court involves share membership in a co-operative society namely Konza Ranching and Farming Co-operative Society Limited, the Third Party

herein. The Counsel went on to submit that by virtue of Section 76 of the Co-operative Societies Act, if any dispute concerning the business of a co-operative society arises among members and persons claiming through members, past members and deceased members, it shall be referred to the Tribunal. The counsel further submitted that the rightful court where the dispute of share membership needs to be disposed off is the Co-operative Tribunal and not the Environment and Land Court. The Counsel cited the case of **Charles Keragita Arwenya vs. Nyakoe Farmers' Co-operative Society Ltd [2016] eKLR** where **Karanjah J** stated as follows:-

“Section 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.”

5. It was also the Counsel's submissions that where a statute provides a clear procedure for redress, it must be strictly adhered to since that particular procedure was laid down for a good reason and cited the case of **Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR** where the Court of Appeal stated as follows:-

“... there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

6. The Counsel further submitted that the legislative intended the Co-operative Tribunal to be the first level of resolution of disputes arising from co-operative societies with an appeal lying in the High Court. The Counsel was of the view that if parties were permitted to lodge claims covered by Section 76 of the co-operative societies to the High Court, this will deny them their day in the High Court at appellate level. To buttress his submissions, the Counsel cited the case of **Bernard Mugo & others v. Kagaari South Farmers Co-operative Society & 4 others [2015] eKLR** where it was held that:-

“It is imperative to note that decisions of the Co-operative Tribunal are appealable to the High Court which is the court of final resort on that category. Matters in 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.”

7. The Counsel ended by submitting that the dispute herein is that of membership in the Third Party which is a duly registered co-operative society under the Co-operative Societies Act. That any decision made by the third Party is through a general meeting at which members have the right to attend, participate and vote on all matters as provided for in Section 27(1) of the Co-operative Societies Act.

8. The Counsel for the Defendant supported the Third Party's Preliminary Objection and urged the court to dismiss the Plaintiff's suit with costs.

9. On the other hand, the Counsel for the Plaintiff submitted that even though the Plaintiff is a member of the co-operative society, the Defendant is not such member. The Counsel went on to submit that this suit does not fall under the provisions of Section 76(1) of the aforementioned Co-operative Societies Act and such, the Co-operative Tribunal lacks jurisdiction to hear and determine it. The Counsel added that this suit is rightly before the court as it has jurisdiction by virtue of Article 162 of the Constitution and Section 13 (2)(e) of the Environment and Land Court, 2011.

10. It was also the Plaintiff's Counsel's submission that the Plaintiff's claim against the Defendant is that of trespass which does not concern the business of the society. The Counsel cited the case of **James Mwangi Kariuki vs. Nanasi Housing co-operative Society Ltd. [2015] eKLR** where the Court of Appeal held that:-

“On the issue of jurisdiction, the appellant contended that he was not a member of the society. Indeed, the affidavit evidence showed that he was a second buyer. He had bought the plot from one Evans Mburu Muthemba who had in turn brought the plot from John King'oo Mutunga who was the original member and shareholder of the society. Thereafter, the appellant paid the transfer fees and other monies for amenities to the society. The society admitted that the appellant was not a member of the society and the High Court made a finding that he had not paid the entrance fees and for one share as required by the By-laws of the society. In the absence of such payment the contention that he was nevertheless treated as a full member cannot stand. The correct position is that appellant was not a member of the society in accordance with the By-laws and that this was indeed a dispute between a non member and the society which is not within the exclusive jurisdiction of a tribunal. The High Court therefore erred in holding that the subordinate court had no jurisdiction to entertain the dispute. For those reasons, the appeal is allowed, the judgment of the High Court set aside and the ruling of the subordinate court restored. The respondent to pay the costs of the appeal to the appellant.”

The Counsel urged the court to dismiss the Preliminary Objection with costs.

11. Finally, the Plaintiff's Counsel submitted that the suit at hand is not in any way an abuse of the court process since the Plaintiff has a cause of action recognized in law and seeks legal redress for the wrongs committed against her.

12. My take on the Preliminary Objection is that it is not in dispute that the Defendant is not a member of Konza Ranching & Farming Co-operative Society Limited. He claims agricultural plot number 7 Malili on the grounds that he bought it from Katunga Kilundo who was a member of the aforementioned co-operative society. He has averred in his defence and more so particularly paragraphs 4, 5 and 8 that the transaction between himself and Katunga Kilundo was sanctioned by Konza Ranching & Farming Co-operative Society Ltd. in 2003. He

denies knowledge of the death of the said Katunga Kilundo who was the husband of the Plaintiff. The Plaintiff has averred in paragraph 5 of her plaint that on 12th April, 2008, she was appointed as one of the administrators of the estate of Katunga Kilundo.

13. **Section 76(1) of the Co-operative Societies Act** provides as follows:-

“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; or Between members, past members or deceased members, and the society, its’ committee or any other officer of the society or; or

Between the society and the other co-operative society;

It shall be referred to the Tribunal.”

14. My reading of the above section is that a person claiming through a member can have his dispute referred to the Co-operative Tribunal. The By-laws of the Third Party annexed to the replying affidavit of David Kalu Yaiitha, the secretary of the Third Party, shows that the objectives of the Society are inter alia to acquire land, buildings, equipment investment and stock for the purpose of managing and developing as a collective farm for the benefit of the members of the society. In my view, this objective falls within the business of the Third Party.

15. The instant case is distinguishable from the authority referred to me by the Plaintiff in that whereas the appellant in the said authority bought a plot from one Evans Mburu Muthemba who had in turn bought the plot from John King’oo Mutunga, the defendant herein bought the plot directly from Katunga Kilundo who was a member. In other words, his claim is through the purchase that he made from Katunga Kilundo. The dispute herein therefore clearly falls within the ambit of Section 76(1) of the Co-operative Societies Act. The above Section has provided a clear procedure through which the dispute between the parties herein ought to be resolved and in my view that is why the Defendant is seeking to enjoin the Third Party so that all the issues in dispute can be heard and determined and also to show his connection with Katunga Kilundo. I, therefore, hold that the right place where this dispute should be heard and determined is the Co-operative Tribunal. The parties will have the right to approach this court in its appellate jurisdiction once the Co-operative Tribunal makes its determination.

16. The upshot of the foregoing is that the Preliminary Objection has merits and in the circumstances, I hereby proceed to strike out the Plaintiff’s suit. The costs of the application shall be borne by the Defendant.

Signed, dated and delivered at **Makueni** this 29th day of **May, 2019**.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Muumbi holding brief for Mr. Musya for the Plaintiff present

Mr. Orina for the Intended Interested Party

No appearance for the Defendant

Ms. Nzioka – Court assistant

MBOGO C.G, JUDGE

29/05/2019.