



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 5 OF 1990

MARIA KANARIO M'ITWAMWARI.....PLAINTIFF

VERSUS

IGOKI MUTETHIA FARMERS CO-OPERATIVE SOCIETY.....1ST DEFENDANT

JAPHET KARUMA.....2ND DEFENDANT

ZIPPORAH MUCHOKI.....3RD DEFENDANT

(CONSOLIDATED WITH)

PRINCIPAL MAGISTRATE'S COURT AT MERU CMCC NO. 103 OF 2009

ZIPPORAH INOMBABU ISAIAH.....PLAINTIFF

VERSUS

TALESISIO MARETE SABERIO.....1ST DEFENDANT

DESDERIO NJERU BENSON.....2ND DEFENDANT

PAUL KIRIMI M'NDEGWA.....3RD DEFENDANT

AND

CMCC NO. 603 OF 2010 (MERU)

M'MUGWIKI P'TWAMWARI (AS LEGAL REPRESENTATIVE OF MARIA KANARION

M'ITWAMWARI.....1ST PLAINTIFF

DESDERIO NJERU BENSON.....2ND PLAINTIFF

TELASISIO MARETE SABERIO.....3RD PLAINTIFF

PAUL KIRIMI M'NDEGWA.....4TH PLAINTIFF

VERSUS

CORNELIUS MUTHURI.....DEFENDANT

RULING

This ruling arises from the Notice of Preliminary Objection raised by the firm of Wambugu & Muriuki Advocates for the 3rd defendant in HCCC No. 5 of 1990 and also the defendants in CMCC No. 603 of 2010 respectively dated 21st November 2018. The said Notice of Preliminary Objection raised the following seven (7) grounds:

1. **That this Honourable Court lacks jurisdiction to determine the matter herein pursuant to Section 76 and 77 of Co-operative Societies Act, Cap 490 Laws of Kenya.**
2. **That the primary suit is between a member of a Co-operative Society, an official of the said Co-operative Society, the Co-operative Society and another member of the said Co-operative Society, therefore a dispute within the provisions of the Co-operative Societies Act, Cap 490 Laws of Kenya.**
3. **That the suit in Meru CMCC No. 603 of 2010 is a claim by a party (ies) claiming through a member and/or past member of a Co-operative Society.**
4. **That the issue (s) in contention relate to share number 128 held by Maria Kanario (deceased) plaintiff in Meru HCCC No. 5 of 1990 and/or its disposition by the Co-operative Society namely Mutethia Igoki Co-operative Society the 1st defendant, to Zipporah Inombabu Isaiah the 3rd defendant allegedly by the collusion of 2nd defendant, an official of the 1st defendant.**
5. **That the primary suit is filed in blatant breach of the due process of the law for failure to adhere to the explicit provisions of laws in regard to disputes related to Co-operative Societies and/or its members including past members and/or person (s) claiming through such.**
6. **That the primary suit is incompetent and incurably defective.**
7. **That suit (s) Meru HCCC No. 5 of 1990 and Meru CMCC No. 603 of 2010 are legally untenable and incurably defective.**

SUBMISSIONS BY THE 3RD DEFENDANT IN ELC NO. 5 OF 1990 AND DEFENDANT IN CMCC NO. 603 OF 2010 (MERU) AND PLAINTIFF IN 103 OF 2009 (MERU)

The 3rd defendant in ELC No. 5 of 1990 (Meru) and the Defendant in CMCC No. 603 of 2010 (Meru) and also the plaintiff in CMCC No. 103 of 2009 (Meru) through the firm of Wambugu & Muriuki Advocates submitted that the gist of the Preliminary Objection is anchored on the provisions of **Sections 76 and 77 of the Co-operative Societies Act Cap 490 Laws of Kenya**. He further submitted that at the centre of the various suits which have been consolidated is a share number 128 that was originally in the name of Maria Kanario M' Itwamwari, which was partially transferred to Zipporah Inombabu Isaiah by the Igoki Mutethia Co-operative Society Ltd and the same was brought to the attention of the former during the annual general meeting held in the month of June 1990. He also submitted that from the pleadings, it is explicit that the dispute herein relates to an issue that falls squarely within the jurisdiction of the Co-operative Tribunal and that this Honourable Court lacks jurisdiction for the basic reason that it is possessed of the appellate upon determination by the Co-operative Tribunal.

In conclusion, it is submitted that the ethical question at play is the sale of share No. 128 that was originally and wholly in the name of Maria Kanario M' Itwamwari in Igoki Mutethia Farmers Co-operative Society. She was informed of her partial disposal during an annual general meeting in the month of June 1990. It is further submitted that the plaintiffs in CMCC No. 603 of 2010 are seeking to enforce a claim through a past member, and/or deceased member of Igoki Mutethia Farmers Co-operative Society from whom they allegedly purchased her share No. 128. The 3rd defendant in ELC No. 5 of 1990, defendant in CMCC No. 603 of 2010 and the plaintiff in CMCC No. 103 of 2009 submitted that the plaintiffs in CMCC No. 603 of 2010 have failed to disclose that they already had an award of damages by consent judgment entered in their favour on 16th March 1993 in HCCC No. 336 'A' of 1991 (Meru) and their claim in CMCC No. 603 of 2010 is therefore Res-judicata and ought to be struck out and more so it as well falls within the confines set out in **Section 76 of Cap 490 Laws of Kenya** in that the admission that they are seeking through a past and/or deceased's member of a Co-operative Society. He therefore sought to have ELC No. 5 of 1990 and CMCC No. 603 of 2010 struck out with costs. He cited the following cases:

1. Lukenya Ranching & Farming Co-operative Society Ltd Vs Kavoloto (1970) 1 E.A 414 (CAN).
2. Gatanga Coffee Growers Co-operative Society Ltd Vs Gitau (1970) 1 E.A 361 (HCK).
3. George & 15 Others Vs Limuru Pyrethrum Growers Co-operative Limited & 9 Others (1989) e K.L.R.
4. Earnest Muiruri Njoroge & 28 Others Vs Kabiru Karanja & 4 Others (1997) e K.L.R.
5. Joseph Njuguna Mwaura & 2 Others Vs Republic (2013) e K.L.R.

SUBMISSIONS BY THE PLAINTIFF IN ELC NO. 5 OF 1990, THE DEFENDANTS IN CMCC NO. 103 OF 2009 AND THE PLAINTIFFS IN CMCC NO. 603 OF 2010.

The plaintiff in ELC No. 5 of 1990, CMCC No. 603 of 2010 and defendants in CMCC No. 103 of 2009 through the firm of Mwangi E.G. & Co. Advocates submitted that the Preliminary Objection as raised against the three consolidated suits lacks merit and ought to be dismissed with costs. She also submitted that the common question of law that runs through the three consolidated suits is who among the various claimants is the owner of land parcel No. KIRIMARA/KITHITHINA BLOCK 1/564. The claimant in suit No. 5 of 1990 sued the Co-operative Sacco and its officials for having sold and transferred her land to the 3rd defendant. She further submitted that the other suits have nothing to do with the Co-operative Society since the parties are litigants under different regimes of the law with the plaintiff in CMCC No.

103 of 2009 claiming vacant possession of the suit land being the registered owner of the suit land. In CMCC No. 603 of 2010, the plaintiffs are claiming ownership under the doctrine of adverse possession. She submitted that it is only the plaintiff in ELC No. 5 of 1990 who is involved in a dispute with the Co-operative Society and its officials. It is submitted that the two defendants are the same parties who applied for consolidation of the suits and also the same parties who filed the Preliminary Objection. She stated that the Preliminary Objection is an abuse of the Court process and made in bad faith. She cited the following cases in opposing the Preliminary Objection:

1. Law Society of Kenya Vs The Centre for Human Rights and Democracy Supreme Court of Kenya Petition No. 14 of 2013 reported in (2014) e K.L.R.
2. Gulam Miriam Vs Julius Charo Karisa (2015) e K.L.R.
3. Benson G. Mutahi Vs Raphael Gichovi Munene Kabutu & 4 Others (2014) e K.L.R.

DISPOSITION

This ruling arises from a Preliminary Objection dated 21st November 2018. A Preliminary Objection was defined in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696* as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may, dispose of the suit”.

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demeanor. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

This Court must now consider whether the issues raised in Notice of Preliminary Objection are matters of law or fact. I have perused the grounds premised in the Notice of Preliminary Objection and the submissions by the counsels appearing for the parties. I have also looked at the pleadings in the various suits which have been consolidated in this case. From my perusal of the plaint in CMCC No. 103 of 2009, the plaintiff is one Zipporah Inombabu Isaiah who sued Talesisio Marete Saberio, Desderio Njeru Benson and Paul Kirimi Mindura over land parcel No. KIRIMARA/KITHITHINA BLOCK 1/562 registered in her name. The plaintiff is seeking orders of eviction, general damages and costs. In the second suit CMCC No. 603 of 2010, the plaintiffs are M’Mugwika M’Itwamwari, Desderio Njeru Benson, Talesisio Marete Saberio and Paul Kirimi M’Ndegwa Versus Cornelius Muthuri as defendants. The subject matter of the dispute is the same parcel of land No. Kirimara/Kithithina/Block 1/562. The plaintiffs are seeking an order of permanent injunction and costs. In the third case which is the parent case in this consolidated case being ELC No. 5 of 1990, the plaintiff is Maria Kanario (deceased) who was a member of Igoki Mwitethia Co-operative Society. She sued the said Mwitethia Co-operative Society Ltd as the 1st defendant, Japhet Karuma as the 2nd defendant and Zipporah Muchoki as the 3rd defendant. The 2nd and third defendants are officials of the 1st defendant Co-operative Society Ltd. Other than ELC No. 5 of 1990, the parties in the other two cases No. 103 of 2009 and 603 of 2010 are neither members nor officials of Mutethia Farmers Co-operative Society Ltd.

Section 76 of the Co-operative Societies Act Cap 490 which this Preliminary Objection has been raised reads as follows:

“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 the Society and any other Co-operative Society; it shall be referred to the tribunal.**

2. Any dispute for the purpose of this section shall include:

- a.
- 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”.**

The subject of this dispute in all the three cases which are consolidated is land parcel No. KIRIMARA/KITHITHINA BLOCK 1/562. From the copy of title deed attached to the pleadings, the suit property is registered in favour of one Cornelius Muthuri after it was transferred by one Zipporah Inombabu Isaiah. Though the plaintiffs in CMCC No. 603 of 2010 are challenging the sub-division of the original land parcel No. KIRIMARA/KATHITHINA/1/128 which was owned by one Maria Kanario M’Itwamwari, those are issues of fact that may require viva voce evidence to determine the manner in which the same was done. In my view, I have not seen a single point of law that has been raised. The land which is the subject of this case is not a dispute as defined under **Section 76 of the Co-operative Societies Act Cap 490** Laws of Kenya. Though the suit property may have been acquired by a member of a Co-operative Society in form of share(s), once the same

is registered in the name of such share holder or any other person, the same shall cease being the property of the Co-operative Society and any dispute arising thereof shall be subject to **Section 13 (2) (a) of the Environment and Land Court Act** which reads as follows:

“13 (2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes, relating to environment and land, including disputes:

a. Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, minerals and other natural resources”.

What has been raised as Preliminary Objection are purely matters of fact which this Honourable Court is fully seized with the requisite jurisdiction to handle at the full hearing. For now, I find the Notice of Preliminary Objection dated 21st November 2018 lack merit and the same is hereby dismissed with costs.

READ and SIGNED in open Court at Meru this 3rd day of June 2019.

E.C. CHERONO

ELC JUDGE

3RD JUNE, 2019

In the presence of:

1. Mr. Kimaita for 3rd Defendant in Case No. 5 of 1990. The Plaintiff in 103/2009 and the Defendant in No. 603/2010
2. Mr. Muchiri holding brief for M/S Kithaka for Plaintiff in Case No. 5/1990, 1st Plaintiff in 603/2010 and 103/2009.
3. Mr. Kiautha Arithi – absent