



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 222 OF 2018

ROYAL HOUSING CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL CO-OPERATIVE HOUSING UNION LIMITED...1ST DEFENDANT/RESPONDENT

WOODTECH INVESTMENT COMPANY LIMITED.....2ND DEFENDANT/RESPONDENT

CHARLES WILLIE MWANGI.....3RD DEFENDANT/RESPONDENT

RULING

1. In the Notice of Preliminary Objection dated 20th February, 2019, the 1st Defendant has averred as follows:

a. That the Plaintiff suit against the 1st Defendant offends the provision of Section 76 of the Co-operative Act Cap 490 the Laws of Kenya.

b. That the dispute/claim arising from the ownership of land parcel number L.R. No. 2358/10 is re judicata the same having been before the Co-operative Tribunal as CTC No. 103 of 2018 which a Ruling was made by the Co-operative Tribunal on 8th January, 2019 and the court made a finding that land parcel number L.R. No. 2358/10 belongs to the 1st Defendant.

c. That in the alternative the Plaintiff suit offends the provisions of Section 6 of the Civil Procedure Act, Cap 21, Laws of Kenya and the same is bad in law and an abuse of the court process.

2. The said Preliminary Objection proceeded by way of written submissions. In his submissions, the 1st Defendant's advocate submitted that the Plaintiff is a Co-operative Society and a member of the 1st Defendant; that the 3rd Defendant is a Director of the 2nd Defendant and that the 2nd Defendant is the company that sold to the 1st Defendant land parcel number L.R. No. 2358/10 Mavoko Municipality.

3. According to the 1st Defendant's counsel, Section 76 of the Co-operative Societies Act gives the Co-operative Tribunal exclusive jurisdiction as the court of first instance in matters between Societies and Societies; Societies and members; and as between members and members. Counsel submitted that this court cannot competently hear this matter as the court of first instance between the Plaintiff and the 1st Defendant.

4. The 1st Defendant's advocate submitted that the suit land is a subject of litigation in both Machakos ELC. No.222 of 2018 and Co-operative Tribunal Case No. CTC. 103 of 2016; that the Application that is currently before the court was heard and determined by the Tribunal and that this matter is *res judicata*.

5. On his part, the 2nd and 3rd Defendants' advocate submitted that they support the 1st Defendant's Preliminary Objection; that Section 76 of the Co-operative Societies Act ousts the jurisdiction of the court and that the Preliminary Objection should be allowed. The Plaintiff's submissions are not on record.

6. In its Plaint dated 26th November, 2018, the Plaintiff described itself as "a primary Co-operative Society registered under the Co-operative Society Act. The Plaintiff described the 1st Defendant as "an umbrella of Co-operative Societies duly incorporated under the Co-operative Societies Act." The 2nd Defendant on the other hand is described in the Plaint as a Limited Liability Company.

7. In the Plaint, the Plaintiff averred that it agreed to purchase L.R. No. 2358/10 (*the suit land*) from the 3rd Defendant; that the 1st Defendant was to finance the balance of the purchase price and that although the Plaintiff has fully repaid the loan, the 1st Defendant has refused,

declined or neglected to transfer the land to the Plaintiff.

8. The Plaintiff is seeking for an order directing the Defendants to issue it with a title for the suit land and in the alternative, for the Defendants to refund it the sum of Kshs. 32,491,879. The Plaintiff is also seeking for damages for the improvements made on the suit land.

9. In its Defence, the 1st Defendant averred that this court lacks jurisdiction to hear the suit and that the subject matter is properly and *bona fide* before the Co-operative Tribunal in Civil Suit No. 103 of 2018 between the Plaintiff and the 1st Defendant.

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

“(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.”

11. The term “*business of the Society*” used in Section 76 of the Co-operative Societies Act in defining a dispute that should be referred to a Tribunal was considered in the case of *Gatanga Coffee Growers Co-operative Society Ltd vs. Gitau (1970) 1 EA 361* as follows;

“‘business of the Society’ is not confined to the internal management of the Society but covers every activity of the Society within the ambit of its by-law and rules.”

12. In its Plaintiff, the Plaintiff has admitted that just like the 1st Defendant, it is a Co-operative Society duly registered under the Co-operative Societies Act; that the 1st Defendant agreed to finance the Plaintiff for the purchase of the suit land and that although the Plaintiff has finished repaying the loan, the 1st Defendant has refused, declined or otherwise neglected to transfer the land to the Plaintiff since 2012.

13. The dispute herein is therefore basically between the Plaintiff and the 1st Defendant. Indeed, it is on that premise that the Plaintiff sued the 1st Defendant in the Co-operative Tribunal at Nairobi in Tribunal Case No. 103 of 2018. I have perused the Plaintiff’s Statement of Claim filed in the Tribunal. In the said claim, the Plaintiff has prayed for an order directing the 1st Defendant herein to release to the Plaintiff the title documents together with the discharge documents for land known as Nairobi/Block 126/64.

14. The 1st Defendant herein has on the other hand filed a Counter-claim in which it has prayed for Judgment to be entered against the Plaintiff in the sum of Kshs. 18,631,739 being the outstanding loan repayment arrears for the purchase of houses on L.R. No. Donyo Sabuk Block 1/2358/10, Phase 1A and 1B. In the alternative, the 1st Defendant herein has prayed for an order allowing them to exercise their statutory right of sale by public auction of the individual member’s unit.

15. The suit in Tribunal Case No.103 of 2018 is pending. Indeed, on 8th January, 2019, the Tribunal ordered for the maintenance of *status quo*, restraining the Claimant/Plaintiff from transferring the suit land to individual members pending the hearing of the suit.

16. The Plaintiff was therefore aware all along that any dispute concerning the business of a Co-operative Society arising between a Society and any other Co-operative Society has to be referred to the Tribunal pursuant to the provisions of Section 76(1) of the Act. That is why he filed in the Tribunal CTC No. 103 of 2018. Having done so, it cannot litigate the same issue in this court.

17. Indeed, it was dishonest on the part of the Plaintiff when it averred in the Plaintiff that “*there is no other suit pending or have there been any previous proceedings, in any court between the Plaintiff and the Defendants over the subject matter herein.*” I say so because by the time the Plaintiff dated 26th November, 2018 was filed, the Plaintiff had already filed its Statement of Claim in respect to the same suit land in the Tribunal.

18. The provisions of Section 76 of the Co-operative Societies Act gives the Co-operative Tribunal exclusive jurisdiction as the court of first instance in disputes between Co-operative Societies, or among members and past members. That being so, this court does not have the original jurisdiction to deal with the Plaintiff’s claim.

19. Even though the Constitution gives this court the mandate to hear all disputes relating to the environment and the use and occupation of, and title to land, which jurisdiction is comprehensive, the said jurisdiction is not centralized. That explains why the court also has an appellate jurisdiction pursuant to the provisions of Section 13(1) of the Environment and Land Court Act.

20. As was held in the case of the *Speaker of the National Assembly vs. Hon. James Njenga Karume (2008) 1 KLR 425*, 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 be strictly followed. Consequently, this suit should have been filed in the Co-operative Tribunal in the first instance and not in this court.

21. Furthermore, having already filed a suit in the Tribunal in respect of the same suit land, the current suit is *sub-judice*, and contrary to the provisions of Section 6 of the Civil Procedure Act.

22. In the circumstances, I find and hold that the suit by the Plaintiff is *sub-judice* and also offends the provisions of Section 76 of the Co-operative Societies Act. The Plaintiff's suit is therefore struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE