



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 185 OF 2017

DISMAS NAMITI.....PLAINTIFF

VERSUS

BASALE FARMERS COOPERATIVE SOCIETY....1ST DEFENDANT

ELIAS SITATI WANJALA.....2ND DEFENDANT

RULING

1. This is a Ruling on a Preliminary Objection dated 22/1/2017 raised by the two defendants in this suit.
2. The essence of that Preliminary Objection is that this suit is an affront to the provisions of **Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya** and that it is also an affront to the provisions of **Section 76 of the Co-operative Societies Act Cap 490 of the Laws of Kenya**.
3. The background to the Preliminary Objection is relevant here. The plaintiff's plaint dated 27/11/2017 states that he and the 2nd defendant were members of the 1st defendant, a co-operative society registered under the **Co-operative Societies Act Cap 490 of the Laws of Kenya** which was the beneficial owner of **LR No. 5565/7, LR No. 6472 and LR. No. 6653**. The plaintiff was allocated **Plot No. 17** in 1975 or thereabouts. He has been totdate in exclusive possession of the plot which measures **5.2 acres** with a road dividing it into two, one portion being **1.1 acres** and the other **4.1 acres**.
4. In 2005, the Co-operative Society filed a dispute at the Co-operative Tribunal contending that the society had expelled the plaintiff from membership and seeking to evict him from the plot and in which dispute the Co-operative Society lost when the Tribunal ruled that the plaintiff was a member and permanently enjoined the Co-operative Society from interfering with the plot.
5. Later the society submitted an area list and map of the Basale Farm to the Director of Survey and the Chief Land Registrar for titling and in so doing omitted the plaintiff's name from the area list. The plaintiff's portion measuring 4.1 acres was shown to belong to the 1st defendant in those documents while the parcel measuring 1.1 acres was incorporated into the 2nd defendant's parcel, No. 117. Titles issued for these parcels in the name of the defendants and the plaintiff claims fraud in the obtainance of those titles.
6. The plaintiff seeks a declaration that the registration of the defendants as owners of plots they got was obtained fraudulently and in violation of the Tribunal judgement, and an order that they be cancelled among others.
7. The defendants filed their written submissions on the Preliminary Objection on 13/2/2018 and the plaintiff on 14/2/2018. I have considered those submissions and I proceed to determine the two issues raised by the Preliminary Objection as hereunder:-

(1) Is the suit in violation of Section 7 of the Civil Procedure Act?

8. In effect the defendant is submitting that this suit is res judicata by virtue of the matters herein having been raised in **Nairobi Co-operative Tribunal Case No. 7 of 2005**. According to the defendants, the plaintiff wishes to have this court retry a matter that has been determined in a former suit. The defendant cites the case of **E.T. -vs- Attorney General and Another [2012] eKLR** in which the court cited the case of **Omondi -vs- National Bank of Kenya Ltd and Others, [2001] EA 177** saying:-

“.....Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.

9. The plaintiff on the other hand relies on *James Katabazi & 21 Others -vs- The Attorney General of the Republic of Uganda [EACJ and Henderson -vs- Henderson [1843-60] ALL.E.R. 378* where the following passage was made:-

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time”.

10. The plaintiff avers that the issues before the Tribunal were whether the present plaintiff had been expelled and whether he deserved to be evicted. The plaintiff avers that the issues arising in the present suit are different, and are as follows:-

(a) Have the 1st and 2nd defendant obtained registration of what comprised Plot No. 17 in Basale Farmers Co-operative Society fraudulently?

(b) Did the defendants act fraudulently in leaving out the name of the plaintiff in the area list presented for titling?

(c) Would the court order the cancellation of the titles obtained by the defendants and further order rectification of the register in order to register the suit plots in the plaintiff's name?

11. I agree with the plaintiff's submission. These issues arise very clearly from the plaint and they are totally different from those before the Tribunal. When the matter was at the Tribunal no titles had been issued. The questions are valid for determination now, and the judgment of the Tribunal merely forms a background against which the plaintiff's claim of fraud can be seen, just like an image in an analogue photography negative against a light in an otherwise dark studio. This court will at a glance then be able to see whether the judgment was complied with. The first limb of the Preliminary Objection therefore fails.

12. The second issue is whether this suit is an affront to the provisions of *Section 76 of the Co-operative Society Act*. In effect the defendant is challenging the jurisdiction of this court to hear and determine this matter on the basis that jurisdiction lies with the Tribunal. I have referred to *Section 76 of the Co-operative Societies Act*. I have also considered the parties submissions on this issue. However, *Article 162 (2) (b) of the Constitution* establishes this court. Pursuant to this Article, the *Environment and Land Court Act No. 19 of 2011* was enacted which provided for the jurisdiction of this court. In *Section 13 (2) (2)* of the Act this court is empowered to hear and determine disputes:-

(a) Relating to environmental, planning and protection, climate issues; land use planning, title, tenure, boundaries, rates rents valuation, mining minerals and other natural resources.

(b)

(c)

(d)

(e) Any other dispute relating to environment and land.

13. The jurisdiction of this court as can be seen from the said Section is quite broad, and as I have stated before in this ruling, when the Tribunal was handling the expulsion and eviction dispute, that preceded this suit, there was no title issued in favour of the defendants then. The plaintiff's grievance in this suit has arisen after a decision was made by the Tribunal and it has been apparently prompted by a violation of the terms of the Tribunal decision by the defendants. However what matters in this application is that the Co-operative Society was formed for the purpose of acquiring land for its members and the plaintiff is not here about mere membership but about a parcel of land he has been occupying, he is threatened with eviction from, and in respect of which fraud is alleged against the defendants for the manner in which they acquired title to the said parcel. This, to me, is not an abstract or theoretical problem but an issue relating to real property and this court is in my view the appropriate forum having a higher jurisdiction for the parties to ventilate their cases, which supersedes that of the Co-operatives Tribunal.

14. Besides, the powers of the Tribunal, as submitted by the plaintiff, may not extend to cancellation of title. The plaintiff has relied on the cases of *Machakos ELC No. 7 of 2003 - Luis Muthini Kitonyi -vs- Konza Ranching & Co-operative Society Ltd, Nyeri ELC No. 545 of 2014 - Kennedy Kimani Ndarwa -vs- Methi & Swani Farmers Co-operative Society Ltd & Another* and *Eldoret ELC Petition No. 2 of 2013 - Mohamed Said -vs-County Council of Nandi & Another*. I approve of those decisions.

15. Consequently I find that the Preliminary Objection filed by the defendants in this case has no merit and the same is dismissed wholly with costs to the plaintiff.

Dated, signed and delivered at Kitale on this 20th day of April, 2018.

MWANGI NJOROGE

JUDGE

20/4/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Mufutu for Mr. Kiarie for Plaintiffs

N/A for Defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

20/4/2018