



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 175 OF 2017

STANLEY MISIGO MAUNDA.....PLAINTIFF

VERSUS

YUYA FARMERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT

R U L I N G

1. This is a Ruling on a **Preliminary Objection** dated **23/4/2018** raised by the defendant in this suit.
2. The essence of that Preliminary Objection is that this honourable court lacks the jurisdiction to entertain the dispute herein by virtue of the provisions of **Section 76 of the Co-operative Societies Act Cap 490 Laws of Kenya**.
3. The background to the Preliminary Objection is that the plaintiff filed a plaint on the **9/11/2017** seeking the following orders:
 - (a) **An order directing the defendant to give the plaintiff 0.9 of an acre or its current value within the surrounding area.**
 - (b) **Costs of the suit.**
4. The grounds on which the prayers are sought were that the defendant is a co-operative society formed for the purposes of buying land for its members; that in **1981** the plaintiff [purchased one share worth **4,000/=** from the defendant; that the one share was equitant to **1.8 acres**; that however the defendant only gave **0.9 acres** to the plaintiff leaving a balance of **0.9 acres**; that the defendant has made attempts to obtain the **0.9 acres** in vain.
5. The defendant filed their statement of defence on **13/12/2017** admitting the task of purchasing land for its members and stating that it purchased **LR No. 9008** measuring **700 acres** for the purpose; that the vendor defaulted in performance of his contractual obligation since his title was encumbered by a charge to Standard Chartered Bank Limited; that the Standard Chartered bank obtained orders to sell the land by public auction ; that in the interest of securing the land for its members the defendant again purchased the same land through public auction. The defendant further avers that the initial sale agreement with the vendor has never been completed and the defendant is currently pursuing a suit emanating from the said agreement being **Eldoret Civil Appeal No. 17 of 2015**.
6. The defendant further pleads in the defence that the parcel of land sought by the plaintiff is unavailable for distribution and neither is the purchase price available for compensation to the plaintiff. It pleads that only **0.36 hectares** is available for transfer to the plaintiff.
7. There is a reply to defence filed on **21/12/2017** stating that the plaintiff is a stranger to the agreement of **21/1/1980**; that the plaintiff purchased his share of **4,000/=** through the defendant during a public auction conducted by the bank; that the defendant confirmed that his share was equivalent to **1.8 acres** and that the plaintiff's claim is different from any other claim.
8. The defendant filed their submissions on the preliminary objection on the **9th October, 2018** and the plaintiff on **29th October, 2018**.
9. The defendant cited the **Section 76 the Co-operative Societies Act Cap 490 Article 162 (2) (b) and Article 162 (3) of the Constitution, Section 150 of the Lands Act No. 6 of 2012 and Section 13 (2) of the Environment and Land Act 2011**.
10. Relying on the decision **Owners of Motor Vessel Lillian S. -vs- Caltex Oil Kenya Ltd KLR Page 1**, the defendant submitted that jurisdiction is everything and without it the court has no power to move in inch.
11. The defendant's submission that the dispute is between a co-operative society and a member and therefore **Section 76 (1) (b) and 2(b) of**

Cap 490 applies.

12. The defendant also cites the case **Gatanga Coffee Growers -vs- Gitau 1970 EA 361** as cited in **Bernard Mugo & Others -vs- Kagaari South Farmers Co-operative Society & 4 Others 2015 eKLR** where the court defined the business of the society as

“...not confined to the internal management of the society but covers every activity of the society within the ambit of its law and rules.”

13. Further the defendant relied on **Gerald Wambua Makau -vs- Lukenya Ranching And Farming Co-Operative Society Ltd & Another 2004 eKLR** and submits that the dispute ought to have been instituted at the Co-Operatives Tribunal as the first dispute resolution mechanism and that this court’s jurisdiction can only be invoked on appeal under the provisions of **Section 81 of Cap 490**.

14. The plaintiff submitted that the plaintiff’s connection with the defendant was not about mere membership but about a parcel of land which he bought but of which he had been defrauded by the defendant.

15. The plaintiff cites **Article 162 (2) (b)** of the **Constitution Section 150** of the **Land Act 2012** and **Section 13 (2) of the Environment and Land Court Act 2011** as granting this court to hear this suit. He quoted this court’s decision in **Kitale Land Case No. 185 of 2017 - Dismas Namiti -vs- Basale Farmers Co-operative Society and Another**, as well as several other decisions: **Machakos ELC No. 7 of 2003 Lius Muithini Kitunyi -vs- Konza Ranching & Co-operative Society**, **Nyeri ELC No. 545 of 2014 Kennedy Kimani Ndarwa -vs- Melti & Swan Farmers Co-operative Society Ltd & Another** and **Eldoret ELC Pet. No. 2 of 2013 Mohamed Siad -vs- County Council of Nandi & Another**.

16. The plaintiff argued the court to dismiss the preliminary objection of the basis of those decisions.

17. I have considered the submissions of the parties.

18. This court dealt with a similar issue in **Kitale Land Case No. 185 of 2017 - Dismas Namiti -vs- Basale Farmers Co-operative Society and Another**. The facts herein are on all fours with those of **Dismas Namiti case**.

19. The plaintiff’s claim is that he bought his share of the land through the defendant at a public auction conducted by the bank and that the share was confirmed by the defendant to translate into **1.8 acres**.

20. The dispute herein is therefore about the size of land the plaintiff is entitled to from the defendant.

21. The **Gerald Wambua Makau -vs- Lukenya Ranching and Farming Co-Operative Society Ltd & Another 2004 eKLR** decision was issued in **2003** before the constitution of Kenya **2010** came into force. It is therefore of no force in the current dispensation.

22. Though the decision in **Bernard Mugo & Others -vs- Kagaari South Farmers Co-operative Society & 4 Others 2015 eKLR** was issued after the current Constitution came into force, the subject matter therein was the disciplinary action against a member, which is not the case herein. That decision is therefore not relevant to the instant suit.

23. I find that the cases cited by the defendant have not established before this court that there is any good ground to depart from the reasoning of this court in **Dismas Namiti case** cited hereinabove.

24. The preliminary objection raised by the defendant has no merit and the same is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 28th day of November, 2018.

MWANGI NJOROGI

JUDGE

28/11/2018

Coram

Before - Hon. Mwangi Njoroge Judge

Court Assistant: Picoty

Mr. Wanyonyi holding brief for Kaosa for the plaintiffs

N/A for the defendants

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

28/11/2018