



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1210 OF 2016

(FORMERLY HCC NO. 43 OF 2008)

ABEL KURURA TINEGA

(Suing as the personal representative of

NAHASHON TINEGA KURURA – deceased
PLAINTIFF

VERSUS

SHADRACK ORINA MOGENI

HEZRON NYANGAU MOGENI

EVANS GESORA MOGENI
DEFENDANTS

AND

BENSON MOGENI ARITA

(Suing as the personal representative of

STEPHANO MOGENI ARITA - DECEASED
COUNTERCLAIMER

VERSUS

ABEL KARURA TINEKA

EKERUBO FARMERS CO-OPERATIVE SOCIETY LTD

SETTLEMENT FUND TRUSTEE

CHIEF LAND REGISTRAR

THE DIRECTOR OF SURVEYS

COUNTY LAND REGISTRAR, NYAMIRA COUNTY

COUNTY SURVEYOR, NYAMIRA COUNTY

ATTORNEY GENERAL DEFENDANTS TO THE COUNTER-CLAIM

RULING

1. On 21st October 2015 the court granted leave to the defendants to amend their defence to include a counter-claim with corresponding leave to the plaintiff to file an amended reply to the defence and defence to the counter-claim. The defendants filed their amended statement of defence and counter-claim dated 27th October 2015 on 3rd November 2015. The freshly introduced counter-claim named the plaintiff and 7 others as defendants to the counter-claim. The counter-claimant's assertion is that his late father was entitled to be allocated 20 acres of land following the subdivision of the 2nd defendant's land parcel on the portion where he had settled but that contrary to the policy and agreement of the members, the 20 acres now forming part of parcel No. 26 was allocated to the plaintiff's father (1st defendant to the counter-claim). The subdivision and allocation of the land parcels was carried out by the 2nd – 6th defendants during the period 1990/1991.
2. The 1st defendant to the counter-claim filed a defence and generally denied all the averments contained in the counter-claim and in answer to the claim for a re-survey of the entire land of the 2nd defendant, the plaintiff/1st defendant to the counter-claim avers that the late father to the counter-claimant was allocated a separate and distinct parcel of **LR No. Ekerubo Settlement Scheme/25** and contends this is the parcel of land the counter-claimant and the other heirs should be occupying. The plaintiff states that title in respect of **LR No. Ekerubo Settlement Scheme/26** was lawfully issued to him and that there can be no basis for its nullification and/or cancellation as sought by the counter-claimant.
3. The plaintiff/1st defendant to the counter claim further under paragraph 16 of the defence to the counter claim averred that the counter claim as pleaded is *res judicata* and further that the same is barred by limitation pursuant to the provisions of the **Limitation of Actions Act**, Cap 22 Laws of Kenya. The plaintiff further averred that the counter-claimant lacks the *locus standi* to bring the counter-claim and that the counterclaim does not disclose any reasonable cause of action. The plaintiff/1st defendant to the counter-claim on the basis of the averments under paragraph 16 to the counter-claim filed a Notice of Preliminary Objection dated 14th November 2016.
4. The 2nd defendant to the counter-claim filed its defence to the counter claim dated 15th December 2015. The 2nd defendant in its defence stated that the plaintiff's father was allocated Plot No. 26 while the defendants' father (counter-claimant) was allocated Plot No. 25 Ekerubo Settlement Scheme in 1991. That a subsequent complaint by the counter-claimant's father together with others to the Co-operatives Tribunal was determined against the complainants in 1992. The counter-claimant dissatisfied by the decision of Tribunal appealed to the Commissioner of Co-operatives who rendered a decision on the appeal on 8th August 1994 directing that members move to the plots that they had been allocated. Not satisfied with the decision of the Commissioner for Co-operatives the counter-claimant appealed to the Minister for Co-operatives who upheld the decision of the Commissioner of Co-operatives vide a decision made on 8th November 1999. The counter-claimant further made an application for judicial review in the High Court vide HCJR No. 1659 of 1999 (Nairobi) seeking an order of Mandamus to compel the Director of Surveys to re-survey land parcel Ekerubo/99910/(original land). The judicial review application was dismissed by Visram, J. (as he then was).
5. The 2nd defendant to the counter-claim contends the issues raised in the counter-claim have conclusively been adjudicated upon in previous proceedings and that the counter-claim is *res judicata*. The 2nd defendant to the counter-claim equally like the 1st defendant filed a Notice of Preliminary Objection dated 9th November 2016 on the grounds that:-

1. The counter-claim is statutorily time barred under the Limitations of Actions Act, Cap 22 Laws of Kenya and is untenable.

2. The counter-claim is res judicata having been adjudicated upon by courts of competent jurisdiction.

3. The counter-claim offends the provisions of Sections 76 and 77 of the Co-operative Societies Act, Cap 490 Laws of Kenya.

4. The counter-claimer lacks the locus standi to institute the present suit.

6. The 4th – 8th defendants filed a statement of defence denying the contents of the counter-claim and claimed to be strangers to allegations made thereon. They denied any wrong doing in any manner to warrant their joinder to the suit. The 4th – 8th defendants filed a Notice of Preliminary Objection dated 1st November 2016 and set out the following grounds:-

1. The suit is statute barred by the provisions of the Public Authorities Limitation Act, Cap 39 Laws of Kenya, Section 3(1) and (2).

2. The suit herein is statute barred by the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya, Section 7.

3. That the court is bereft jurisdiction to entertain the issues raised in the counter-claim against the defendants by provisions of Sections 76 and 77 of the Co-operative Societies Act, Cap 490 Laws of Kenya.

7. I have set out in outline the pleadings by the parties as a basis for the consideration of the Preliminary Objections raised by the defendants to the counter-claim. Upon being granted leave to amend their defence the defendants filed their amended defence which included a counter-claim which has provoked the Preliminary Objections that the defendants to the counter-claim have filed. As the preliminary objections raised the issue of *res judicata*, and limitation of action that questioned the jurisdiction of the court to entertain the counter-claim, I directed that the preliminary objections be determined first and I directed the parties to file and exchange written submissions in regard to the preliminary objections.

8. Looked at wholesomely the preliminary objections taken by the defendants have common threads and I will therefore deal with them together. The preliminary objections as I have perceived them are to the effect that:-

1. The counter-claimer's counter-claim against all the defendants is statute barred by reason of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

2. That the counter-claim is res judicata the issues raised herein having been determined previously by the Co-operatives Tribunal under Section 76 and 77 of the Co-operative Societies Act, Cap 490 Laws of Kenya.

3. The court lacks jurisdiction to deal with the matter by reason of Section 76 and 77 of the Co-operative Societies Act.

9. The counter-claimer faced with the multiple preliminary objections filed what he termed as reply to the objections dated 14th November 2016 and interalia contended thus:-

1. The counter-claim is a claim of declaratory orders which have no time limits as per the provisions of Cap. 39 Laws of Kenya.

2. The counter-claimer is seeking determination of his proprietary rights in the suit land as per Articles 40, 63, 64, 68 and 162(2)(b) of the Constitution.

3. That the court has powers to deal with the counter-claim as per Sections 18, 19 and 20 of the Environment and Land Court Act, 2011.

4. That section 7 of the Cap 22 Laws of Kenya is not coined in Mandatory terms.

5. That the court has unfettered discretionary powers under Section 27 and 28 under the Limitation of Actions Act to extend time for purposes of correcting or rectifying an error.

6. That section 7 of the Civil Procedure Act Cap 21 Laws of Kenya has no application to this matter.

7. That it will be only fair and just that the counter-claim be heard on merits.

10. From the pleadings and a perusal of the documents furnished by the respective parties there cannot be any dispute that the actions that led to the subdivision of the original land belonging to Ekerubo Farmers Co-operative Society Ltd, the 2nd defendant to the counter-claim, to its members took place during 1980s and early 1990s. The subdivision and allocation of the Co-operative Society's land of which the plaintiff's father and the defendant's father were members provoked the Arbitration Case No. 29 of 1991 ordered by the Commissioner of Co-operatives under the **Co-operative Societies Act**, Cap 490 Laws of Kenya. The complaint by the complainants against the Co-operative Society related to plot allocation.

11. The arbitrator rendered a judgment on 6th November 1992 dismissing the complainants claim. The appeal by the complainants' against the decision and award of the arbitrator to the Commissioner of Co-operatives was dismissed on 8th August 1994. It does appear the complainants not being yet satisfied they petitioned the Minister for Co-operative Development who upheld the decision of the arbitrator and the Commissioner of Co-operatives vide a decision given on 14th December 1999. Being not satisfied with the Minister's decision the complainants filed a Judicial Review application in the High Court vide Misc. App. Case No. 1659 of 1999 seeking to quash the decision of the Minister and an order of Mandamus directed against the Director of Surveys to compel him to order a resurvey of land parcel **Kisii/Ekerubo/999101**. While the High Court held that the Minister acted without jurisdiction in entertaining the petition, the court held that the Commissioner of Co-operatives decision stood, it not having been successfully challenged. Under the **Co-operative Societies Act**, then in force, the decision of Commissioner could only be challenged by way of an appeal to the High Court whose decision would be final.

12. Having perused the various documents furnished by the parties and the judgment by the arbitrator and the Commissioner of Co-operatives proceedings and decision in the resultant appeal, I am satisfied that the issues that the counter-claimer has raised in his counter-claim are the same issues that were raised and decided upon before the arbitrator and hence in the instant suit the counter-claimer in effect is seeking to have a second bite of the cherry. The issues in my view were considered and adjudicated upon by a competent body that had the jurisdiction to deal with and determine the issues. This court lacks the jurisdiction to deal with a dispute where an alternative means of resolving the dispute had been provided unless the dispute mechanism had been exhausted.

13. In the instant matter, it is evident the parties had recognized the dispute was one that fell to be determined under the dispute resolution mechanism provided under the **Co-operative Societies Act** and appropriately invoked that mechanism and had the dispute arbitrated upon and an appeal arising from the arbitral award preferred and determined in accordance with the Act. The option any aggrieved party had was to appeal the decision of the Commissioner of Co-operatives to the High Court. The claimants who no doubt included the counter-claimer's deceased father instead of appealing the commissioner's decision to the High Court as provided by the Act, opted to make a petition to the Minister for Co-operatives who clearly had no role in the dispute resolution mechanism under the Act. **Visram, J.** (as he then was) rightly held that any decision made by the Minister was null and void and properly dismissed the judicial review application by the claimants challenging the Minister's decision.

14. My view therefore is that as the dispute was between a registered Co-operative society and its

members, the dispute had to be dealt with under the provisions of the **Co-operatives Societies Act**, then in force and that the High Court did not have the jurisdiction to deal with the dispute. In the case of **Kagaa Farmers Co-operative Society –vs- Ndugu Ngethe & 6 Others [2011] eKLR Okwengu, J.** (as she then was) held that where a dispute is between a Co-operative Society and its members, it is the Co-operative Tribunal which has the original jurisdiction and not the court.

15. In the Court of Appeal case of **Speaker of the National Assembly –vs- James Njenga Karume [1992] eKLR** their Lordships held that where the law provides a procedure for redress of any grievance such procedure must be strictly followed and exhausted. The judges stated thus:

“In our view, there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

16. In the premises, I hold the court would have had no jurisdiction to deal with the dispute that clearly fell under Section 76 of the **Co-operative Societies Act** and the dispute having been dealt with in accordance with the said Act, the instant counter-claim in any event would be *res judicata* and I so hold.

17. On the issue of limitation, the actions that precipitated the reference to arbitration took place before 1992. The counter-claimer’s father together with others initiated the proceedings before the tribunal in accordance with the Act. The cause of action arose in 1990/1991 when the counter-claim alleges their land (20 acres) was allocated to the plaintiff. Under the provisions of Section 7 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya the counter-claimer would be statutorily barred from bringing the counter-claim. The counter-claim is time barred and cannot be sustained. Section 7 of the Limitation of Actions Act provides:-

“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.”

I am satisfied the counter-claim is time barred and is unsustainable and I so hold.

18. On the other issue that the counter-claimer lacks the *locus standi* to bring the counter-claim as he was not a member of the 2nd defendant, my view is that the counter-claimer would have the *locus standi* as he is claiming through his deceased father who was a member. Section 76(1) (a) and (b) envisages that a claim by past or deceased member would be sustainable provided it is brought by the personal legal representative of the deceased member.

Section 76 (1) (a) and (b) provides:

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) Among 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.

To the extent that the counter-claimer’s claim is founded on the membership of his late father in the 2nd defendant the counter-claimer as the personal representative of his deceased father would have the *locus*

standi to bring the action and I so hold.

19. However, as I have held the court lacks the jurisdiction to entertain the counter-claim and further that the counter-claim would in any case be *res judicata*. I uphold the preliminary objections by the 1st, 2nd and 4th – 8th defendants to the counter-claim.

20. Accordingly, I order the counter-claim to be struck out in its entirety. I make no order for costs and I direct that each party will bear their own costs of the preliminary objection and the counter-claim.

21. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 31st day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st to 7th defendants

..... court assistant

J. M. MUTUNGI

JUDGE