



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 545 OF 2014

and

ELC NO. 587 OF 2014

(Formerly NYERI HCC 73 OF 2012)

KENNEDY KIMANI NDARWA PLAINTIFF

-VERSUS-

METHI & SWANI FARMERS

COOPERATIVE SOCIETY LIMITED 1ST DEFENDANT

PETER IRUNGU KAMAU 2ND DEFENDANT

RULING

1. On **28th March, 2012** the plaintiff (Kennedy Kimani Ndarwa), who claims to be a member of the 1st defendant, (Methi & Swani Farmers Cooperative Society Limited), instituted the current suit seeking judgment against the defendants for:-

1. An order of cancellation of all entries in the 1st defendant's records that purport to give the second defendant, Peter Irungu Kamau, the suit property (the parcel of land known as Mitubiri/Wempa/14).
2. An order directing the District Land Registrar, Murang'a to cancel the registration of the defendant as the owner of the suit property.
3. A declaration that the plaintiff is the owner of the suit property and that a title deed should be issued to him.
4. Costs of the suit.

2. The plaintiff claims to have bought shares from the 1st defendant through one of its members, Philip Maina Wachira. Upon buying the shares he was given share certificate number 3872.

3. It is the plaintiff's case that he was shown the suit property as his entitlement pursuant to the shares he had. He took possession and occupied the suit property as he waited to be issued with a title deed. To his surprise, he discovered that the 1st defendant has transferred the property to the 2nd defendant.

4. In its statement of defence dated 16th April, 2012, the 1st defendant denied all the allegations

levelled against it and contended that the plaintiff is not its member. It also denied having entered into the arrangement pursuant to which the plaintiff claims to have become its member and having put the plaintiff into possession of the suit property. The 1st defendant further contended that this court has no jurisdiction to hear and determine the dispute because disputes between Cooperative Societies and its members should be heard by the Cooperative Tribunal established under the Cooperative Societies Act, Cap 490 Laws of Kenya.

5. On **22nd June, 2015** the 1st defendant filed the notice of preliminary objection dated **19th June, 2015** in which it terms the current suit an abuse of the court process and prays for its dismissal on the ground that this court lacks jurisdiction to hear and determine the dispute herein.

6. Since a notice of preliminary objection has the potential of determining the suit preliminarily, directions were taken to the effect that the notice of preliminary objection be determined first.

7. Further directions were taken to the effect that the preliminary objection be disposed of by way of written submissions.

Submissions

8. On behalf of the 1st defendant, reference is made to paragraphs 4 and 5 of the plaint where the plaintiff claims to be entitled to a share of the land the 1st defendant was distributing to its members and pointed out that the 1st defendant, through its statement of defence, denies that the plaintiff was its member, and contended that the question as to whether the plaintiff was a member of the 1st defendant can only be determined by the Cooperative Tribunal established under the Cooperative Societies Act.

9. Based on the decisions in the cases of **Murata Farmers Sacco Society Limited v. The Cooperative Bank of Kenya Ltd-Nairobi HCCC N0.548 of 2001**; **Muthui Wa Kariuki v. Tembo Co-operative Savings and Credit Society-Nairobi HCCC No.482 of 2010**; **Kabita Chege v. Kariobangi Housing & Settlement & Co-operative Society Nairobi ELC No.587 of 2010** it is reiterated that this court has no jurisdiction to hear and determine the dispute herein. The court is urged to strike out the suit with costs to the 1st defendant.

10. In all the cases cited herein above the suits which had been filed in the High Court were struck out on the ground that they ought to have been filed at the Cooperative Tribunal.

11. In the case of **Chege Kabita v. Kariobangi Housing & Settlement Cooperative society (supra)**, **Okwengu J.**, (as she then was) stated:-

“I have given due consideration to the objection and the submissions made. I find that the preliminary objection is not anchored on factual details, but is anchored on a point of law which is the issue of jurisdiction. From the plaint dated 2nd December, 2010, the plaintiff’s suit is hinged on his relationship with the defendant as a member of the defendant’s society. The dispute concerns land being plot No.192 on LR No.220 of 2004 which the plaintiff claims to be entitled to as a member of the defendant society, which land is also being claimed by the defendant. In my view the dispute concerns the business of the defendant as a housing and Settlement Society and falls within section 76(1)(b) of cap 490. I find that section 76(2) of cap 490 which provides the definition of a dispute, is not exhaustive as it uses the word “includes”. (Ephasis supplied).

12. In the case of **Muthui Kariuki v. Tembo Cooperative Savings & Credit Society (supra)** **Havelock J.**, (as he then was) observed:-

“I have particularly noted the findings of my learned sister Wendo J., in the Gerald Makau case (supra). I note that the plaintiff in that case was seeking injunction to restrain the defendant cooperative society from in any way interfering with the peaceful occupation and use of the plot being the subject matter of that suit. The plaintiff therein also sought general damages and exemplary damages. However, my learned sister’s findings is not binding on this court but

persuasive and I accept her observations in that suit firstly, that the Cooperative Tribunal issues Injunctions and secondly, that the suit belonged in the said Tribunal....The plaintiff claims title and the suit property from the defendant; he seeks an injunction to prevent the defendant from going on to the suit property; he seeks damages for loss of user and the removal of the septic tank that he maintains has been constructed by the defendant society on the suit property. In my view, these are all matters concerning the business of the defendant cooperative society in its relations/dealings with its members. As a result, I uphold the defendant's preliminary objection and find this matter is improperly before this court..." (Emphasis supplied).

13. On behalf of the plaintiff/respondent, it is pointed out that the plaintiff's main prayer is the cancellation of the title issued to the 2nd defendant in respect of the suit property and argued that such a prayer can only be granted by the Environment and Land Court. In this regard, reference is made to **Article 162(2)(b)** of the Constitution of Kenya and **Section 13(2)** of the Environment and Land Court Act, 2011 and reiterated that any dispute relating to Environment and Land can only be heard by the Environment and Land Court.

14. Further reference is made to the cases of **John Kimani Njenga v. Margaret Wanjiru and 2 others (2015) eKLR**; **Paul Mutua Mutwiwa v. Kimeu Kyumba and 2 others, Machakos HCCC No. 438 of 2012**; **Toratio Nyangau & 4 others v. Lietego Farmers Cooperative Society Nairobi HCA No.226 of 2004**; **Republic v. Gathaithe Farmers Cooperative Society Limited ex parte Richard Nganga Kamiro (2013)eKLR** and reiterated that this court has jurisdiction to hear and determine the dispute herein.

15. In the case of **Paul Mutua Mutwiwa v. Kimeu Kyumba and 2 others (supra)**, it was held:-

"...The provisions of Section 76 of the Cooperative Societies Act, No.12 of 1997 do not contemplate the Cooperative Tribunal to determine the ownership of land even if the dispute is between members, present, past, deceased and even if it was, the same has been superseded by the enactment of article 162(2)(b) of the Constitution and the creation of the Environment and Land Court. Thus this court has jurisdiction to entertain this matter and the preliminary objection is dismissed."

16. In **Toratio Nyang'au & 4 Others v. Lietego FCS Limited (2011) e KLR (supra)** Maraga J., (as he then was) observed:-

"In its effort to resolve the matter the Tribunal attempted to define the term "dispute". That is where, in my view, it started erring. The operative word in that section is "business". So the Tribunal should have determined whether or not the dispute before it concerned the "business" of the respondent society.

The Cooperative Societies Act does not define the term "business". But we know that cooperative societies are business organizations owned and operated by a group of individuals for their own mutual benefit. Although we are not told what the respondent was established to do, I am, however, certain that resolving its land disputes with third parties whether or not they are its members cannot have been one of the businesses of the respondent society. In the circumstances the land ownership dispute in this case did not fall within the purview of Section 76 of the Societies Act and the Tribunal had, therefore, no jurisdiction to entertain the matter.

Even if I am wrong in my understanding of Section 76 of the Cooperative Societies Act I am certain that as the land in this case is registered under the Registered Land Act, Cap 300, it is clear from Section 159 thereof that the Tribunal had no jurisdiction to try the matter..."

17. In the case of **Republic v. Gathaithe Farmers Cooperative Society Limited ex parte Richard Nganga Kamiro (supra)**, Korir J., held:-

"From the evidence placed before this court, it clearly emerges that the applicant has never

been a member of the society. He did not file any claim through a member. He did not therefore fall under the jurisdiction of the tribunal. he was out of reach of the Tribunal and any claim the society or any member of the society had against him ought to have been litigated before a court with pecuniary jurisdiction to hear the matter.

I even doubt whether the tribunal had authority to hear a dispute touching on title to land. it is noted that the land regime has been recently been overhauled....the jurisdiction of the tribunal is to hear disputes concerning the business of a cooperative society if such a dispute arises among members, past members, deceased members or persons claiming through members. Section 76(2) specifies what a dispute is for the purposes of section 76. There is no mention of the Tribunal being given jurisdiction to hear land disputes in the said section....In my view the said tribunal had no jurisdiction to revoke the applicant's title to the land in question. At the moment such matters ought to be dealt with by the Land and Environment Court. previously such disputes were the preserve of the High Court and the Resident Magistrate's Court where the latter had pecuniary jurisdiction."

Analysis and determination

18. From the above cited authorities, it is clear that opinion on the jurisdiction of the Cooperative Tribunal to hear and determine land disputes concerning members of a cooperative society or between a cooperative society and its members or between a cooperative society and third parties is divided. Whereas some High Court judges hold the opinion that the tribunal has jurisdiction to determine such disputes, others hold the view that such disputes are the preserve of the Environment and Land Court.

19. Those judges who hold the view that the Tribunal has no jurisdiction to hear and determine land disputes argue that it is inconceivable that settlement of land disputes is one of the businesses of a Cooperative Society contemplated under **Section 76** of the Cooperative Societies Act. The proponents of that approach also argue that only the Environment and Land Court Established under the Environment and Land Court Act, 2011 has jurisdiction to cancel title to land.

20. Having read and considered the different positions taken by various High Court judges concerning the jurisdiction of the Cooperative Tribunal to hear and determine Land Disputes between its members, though the decisions are not binding on this court, I am persuaded by the reasoning of **Maraga J.**, in the case of **Toratio Nyang'au & 4 Others v. Lietego FCS Limited (supra)** that it is inconceivable that the business of a cooperative society contemplated under **Section 76** of the Cooperative Societies Act includes settlement of land disputes among the society's members or the society, its members and third parties. I also doubt that the Society has power to cancel title to land, which under **Section 80** of the Land Registration Act is a power donated to the Environment and Land Court established under the Environment and Land Court Act, 2011. In this regard see the said Section as read with **Section 2** of the Act. The Section provide as follows:-

"80(1) Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

The term Court is described under **Section 2** of the Act as:-

"Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 No. 19 of 2011."

21. The upshot of the foregoing is that the notice of preliminary objection herein has no merit and is dismissed with costs to the plaintiff respondent.

Dated, signed and delivered at Nyeri this 9th day of June, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Macharia h/b for Mr. Kibuka Wachira for the plaintiffs in 587 and 545

Mr. Njuguna h/b for Mr. Mugo for 1st defendant in 587 and 545

N/A for 2nd defendant

Court assistant - Lydia