



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & KANTAI, JJ.A.)

CIVIL APPEAL NO. 333 OF 2012

BETWEEN

JAMES MWANGI KARIUKI.....APPELLANT

AND

NANASI HOUSING CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (D. A. Onyancha, J.)
delivered on 18th September, 2012*

in

H.C.C.A. No. 42 of 2012)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (*Onyancha, J.*) allowing the appeal by **Nanasi Housing Co-operative Society (Society)** against the ruling of the Senior Resident Magistrate, Thika By a plaint dated 27th April 2009 and filed in the Chief Magistrate's Court at Thika, **James Mwangi Kariuki** the appellant herein sought a permanent injunction to restrain the society from repossessing or from interfering with appellant's title and possession of plot Number 325 Nanasi Estate, phase one. The appellant averred in the plaint that he was a *bona fide* purchaser and allottee and that the society had informed him that it had repossessed the plot and it would be allocated to a third party. The appellant further averred that the action of the society is fraudulent and illegal.

The society filed a statement of defence denying the allegations in the plaint and averred, *inter alia*, that the suit is fatally defective as it offends By-law Nos. 20 and 58 of the Society's By-laws. The society also denied the jurisdiction of the subordinate court.

The plaint was accompanied by an application for interlocutory injunction to restrain the society from interfering with the appellant's possession of the disputed plot until the determination of the suit. In the supporting affidavit, the appellant deponed that he purchased the plot from one **Evans Muthemba Mburu** on 29th May 1992, who had earlier purchased the plot from one **John King'oo Mutunga**, the original allottee. The appellant further deponed that he paid the transfer fees to the society upon which the plot was registered in his name and thereafter deposited shs. 99,000/- in the society's bank account for

provision of amenities as demanded by the society. He annexed the relevant documents to the replying affidavit.

The society did not file a replying affidavit or attend the hearing of the application. The subordinate court on 9th June 2009 allowed the application for injunction. Subsequently, on 26th June, 2009, the society filed an application to vacate the order of injunction but the application was struck out on 3rd September, 2009. On 22nd September, 2009 the society filed a second application seeking various orders of injunction and a further order that the suit be dismissed for being an abuse of the process of the court. The application was supported by the affidavit of **Peter Ng'ang'a Kamuyu** – the Secretary of the society to which he annexed several documents.

In paragraph 6 of the supporting affidavit the deponent stated;

“That the plaintiff purportedly bought plot number 325 from Evans Mburu Muthemba but failed to pay the entrance fees, transfer fees as stipulated in clause No. 22 of the defendants by-laws thus he is not a member of the defendant.”

The Secretary also deponed that the society issued a notice dated 15th February, 2002 to the appellant which he failed to comply with. The notice referred to, notified the appellant that the plot would be repossessed if he did not make payment for infrastructure within 90 days. The Secretary further stated that on the strength of the resolution of the society the plot was repossessed, re-balloted and allocated to one **Margaret Wairimu Mbiria** who was issued with a Certificate of Lease from the Government dated 30th July, 2009.

The basis of the application for striking out the suit was jurisdiction. In support of the application Mr. Muthomi for the society submitted that the subordinate court lacked jurisdiction to entertain the suit as the appellant was claiming through a member of the society. He contended that such a dispute, should, under **section 76(1) (a)** be referred to Co-operative Tribunal for arbitration.

On the other hand, Mr. Kariuki for the appellant submitted that the appellant was not claiming through a member but in his own right as a *bona fide* purchaser and hence s.76 of the Co-operative Societies Act did not apply. By a ruling dated 27th January 2010, the subordinate court dismissed that part of the application which challenged the jurisdiction of the court, and held that the court had jurisdiction and section 76 of the Co-operative Societies Act did not apply as the appellant was a *bona fide* purchaser from a member and not a member of the society. The society appealed to the High Court and by a judgment dated 18th September, 2012 the High Court allowed the appeal and held in essence, that the society always had a right and control of the land through its management rules and that the subordinate court had no jurisdiction over a subject matter of a co-operative society.

The appeal is against the decision of the High Court. The seven grounds of appeal were argued together. In essence, the appellant's complaint is that the learned judge failed to appreciate the provisions of section 76 of the Co-operative Societies Act and that the dispute involved a non member and a co-operative society over the fraudulent appropriation and re-allocation of the appellant's plot. It was submitted on behalf of the appellant that one needs to be a shareholder of the society before he can become a member and the appellant never became a member.

Mr. Muthomi submitted on behalf of the society, *inter alia*, that although the agreement of sale was between a member and a third party, the sale was governed by the society's regulations that required plot buyers to be members; that the sale had to be sanctioned by the society; that upon payment of transfer fees by the appellant the sale was sanctioned and the appellant continued to be treated as a “full member” of the society.

Section 76(1) of the co-Operative Societies Act provides:

“If any dispute concerning the business of a co-operative society arises –

Among members, past members and persons claiming through members, past members and deceased members; or

Between members, past members or deceased members, and the society, its committee or any other officer of the society; or

Between the society and any other co-operative society;

it shall be referred to the Tribunal.”

It appears from the By-laws of the society that the object of the society was to acquire land through members' contributions to the share capital, and thereafter allocate land to individual members. Each member was required to pay entrance fees of shs. 1,000/- and buy shares worth shs. 5,000/-. A member ceased to be a member by, *inter alia*, on transfer of shares held by him. The By-laws of the society allowed members to transfer shares or plots on condition that such transfer is approved by the management committee and upon payment of shs 20,000/- which was inclusive of shs. 1,000/- entrance fees and shs. 5,000/- for one share. The High Court made a finding that the appellant took over the plot and undertook to pay the required entrance fees as well as purchase one share of the society by paying cash or cash worth soon after; that the transaction was noted in the society's record and the society started treating him as member. However, the High Court made a finding that despite notices to the appellant; he did not make payment for entrance fees and for one share.

The issue raised in the application before the subordinate court was not whether or not the transfer of the plot was in compliance with the society's By-laws but whether or not the subordinate court had jurisdiction to entertain the dispute. The issue whether the transfer of the plot had complied with the society's By-laws was raised in the defence. That is an issue of fact which could only have been resolved at the trial.

On the issue of jurisdiction, the appellant contended that he was not a member of the society. Indeed, the affidavit evidence showed that he was a second buyer. He had bought the plot from one Evans Mburu Muthemba who had in turn brought the plot from John King'oo Mutunga who was the original member and shareholder of the society. Thereafter, the appellant paid the transfer fees and other monies for amenities to the society. The society admitted that the appellant was not a member of the society and the High Court made a finding that he had not paid the entrance fees and for one share as required by the By-laws of the society. In the absence of such payment the contention that he was nevertheless treated as a full member cannot stand. The correct position is that appellant was not a member of the society in accordance with the By-laws and that this was indeed a dispute between a non member and the society which is not within the exclusive jurisdiction of a tribunal. The High Court therefore erred in holding that the subordinate court had no jurisdiction to entertain the dispute.

For those reasons, the appeal is allowed, the judgment of the High Court set aside and the ruling of the subordinate court restored. The respondent to pay the costs of the appeal to the appellant.

Dated and delivered at Nairobi this 18th day of December, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR