



New Nzau Farmers Co-operative Society Ltd v Muange (Environment and Land Appeal 39B of 2018) [2024] KEELC 4837 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 39B OF 2018**

**TW MURIGI, J
JUNE 13, 2024**

**BETWEEN
NEW NZAUI FARMERS CO-OPERATIVE SOCIETY LTD APPELLANT
AND
MUTUA MUANGE RESPONDENT**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 25th November, 2019 raised by Respondent on the following grounds:
 - a. This appeal is unconstitutional because it encroaches on Article 159 (2) (b).
 - b. The appeal was filed out of time without leave.
 - c. The appeal lacks an order or decree intended to be appealed against.
 - d. The appeal lacks a certificate of delay.
 - e. The Appellant does not exist.
 - f. The Appellants, if at all they exist (which is denied), have no valid documents of title to the disputed land.
2. On the basis of the above, the Respondent urged the court to dismiss the Appeal with costs and to order the Commissioner of Co-operatives to deregister the Appellant.
3. The Appellant opposed the preliminary objection through the Replying affidavit of its Chairman, Davis Makau Nduu sworn on 28th January, 2020. According to the Appellant, the Co-operative Tribunal delivered its judgment on 4th May, 2018 and not the 5th April, 2018 as alleged.



4. The deponent contended that the preliminary objection is devoid of merit and the same should be dismissed with costs.
5. The parties were directed to canvass the preliminary objection by way of written submissions.
6. As at the time of writing this ruling, the Appellant had not filed its submissions as directed.

The Respondent's Submissions

7. The Respondent's submissions were filed on 26th November 2019.
8. On his behalf, Counsel submitted that Section 79G of the *Civil Procedure Act* and Section 81 (1) of the *Co-operative Societies Act* provides that an appeal from any subordinate court should be filed in the High Court within a period of thirty (30) days from the date of the order or decree appealed against. Counsel further submitted that the Co-operative Tribunal delivered its judgment on 5th April, 2018 and as such, the Appeal herein ought to have been filed by 6th May, 2018. Counsel submitted that the appeal herein was filed on 31st May, 2018 which is twenty-five (25) days out of time.
9. Counsel submitted that the appeal herein is irregular as it has been filed out of time without the requisite leave and ought to be struck out with costs. Counsel further submitted that the record of appeal does not contain a certificate of delay or the decree intended to be appealed against.
10. Counsel further submitted that the appeal herein is being prosecuted by strangers who have no claim to office for non-compliance with Section 25 (11) of the *Co-operative Societies Act*. It was argued that the Commissioner of Co-operatives should have deregistered the Appellant under Section 62 (1) of the *Co-operative Societies Act*. Concluding his submissions, Counsel urged the Court to dismiss the Appeal with costs.

Analysis And Determination

11. The law on preliminary objection is settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issue. The improper practice should stop.”



13. In *Oraro vs Mbaja* (2005) eKLR Ojwang J (as he then was) described it as follows: -

“I think the principle is abundantly clear. A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

14. Having considered the preliminary objection, the replying affidavit and the Respondent’s submissions, the only issue that arises for determination is whether the appeal was filed out of time. Section 79G of the *Civil Procedure Act* provides as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.’

15. The record of appeal shows that the Co-operative Tribunal delivered its judgment on 4th May, 2018. The Appellant produced a letter from the Co-operative Tribunal which confirmed that the judgment was delivered on 4th May, 2018. The Appeal was filed on 31st May, 2018 which is within the statutory timelines.

16. The Respondent contended that the Appellant does not exist and if it does, then it does not have valid documents of title in respect of the disputed land.

17. The issue of whether the Appellant exists or whether it has valid documents of title is based on facts which can only be proved by way of evidence. The court cannot delve into ascertaining the existence of the Appellant at this stage without a scrutiny of the evidence of the parties. A preliminary objection cannot be raised on disputed facts.

18. In the end, I find that the preliminary objection dated 25th November, 2019 is devoid of merit and the same is to be dismissed with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF JUNE, 2024.

In the presence of:

Court Assistant Kwemboi.

Mbuthia for the Respondent

Muriuki for the Appellant

