



Liquidator for Mukungugu Farmers Cooperative Society v Gathua & 5 others (Environment & Land Case 26 of 2020) [2024] KEELC 7140 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 26 OF 2020
MAO ODENY, J
OCTOBER 30, 2024**

BETWEEN

THE LIQUIDATOR FOR MUKUNGUGU FARMERS COOPERATIVE SOCIETY PLAINTIFF

AND

**RICHARD K GATHUA 1ST DEFENDANT
EUTYCUS THIONG'O 2ND DEFENDANT
ANTHONY N KIARIE 3RD DEFENDANT
JOHN K NJOROGE 4TH DEFENDANT
BERNARD K KARIUKI 5TH DEFENDANT
SALOME W CHEGE 6TH DEFENDANT**

JUDGMENT

1. By a Plaint dated 16th March, 2020, the Plaintiff herein sued the Defendants seeking the following prayers:
 - a. An order of a permanent injunction restraining the Defendants by themselves, their agents, their servants, their employees from dealing with, interfering with or in any way disrupting the Plaintiff from fulfilling his mandate of liquidating Mukungugu Farmer's Cooperative Society which includes sale of the parcels of land described as Njoro/njoro Block 1 (mukungugu) (a) Catle Dip Plot No. 332 (2), Njoro/njoro Block 1 (mukungugu) (a) Artificial Insemination (a.i) Plot No. 326 (3) And Njoro/njoro Block 1 (mukungugu) (a) Market Place Plot No. 334.
 - b. Costs of this suit be borne by the Defendants.



2. The Defendants filed a Statement of Defence and Counterclaim dated 7th May, 2020 where they prayed for the following orders against the Plaintiff:
 - a. A declaration that all the Public Utility Plots Number Njoro/Njoro/Block 1/326, 332 and 334 (Mukungugu) should be retained as such.
 - b. An order directing the cancellation of any Sub-divisions to the suit properties and/or any registered mutations carried out by the Plaintiff.
 - c. That the Mukungugu Farmers Co-operative Society be awarded damages for the destruction of the Cattle Dip and the trees cut down.

Plaintiff's Case

3. PW1 Xavier Lugaga Okado adopted his witness statement dated 18th March 2020 and stated that he is the liquidator of Mukungugu Farmers' Co-operative Society Limited having been appointed by the Commissioner for Co-operative Development under Section 65 of Cap 490. He stated that he was appointed after members met and resolved at an Annual General Meeting held on 5th December 2015 at the Mukungugu Farmers Cooperative Society premises Njoro that the society be dissolved and some properties be disposed of.
4. It was PW1's case that PW1 testified that they forwarded the minutes to the Commissioner of Co-operatives requesting for the deregistration of the society and the appointment of a liquidator of which after receiving the minutes appointed him as a Liquidator. He further stated that his term as a Liquidator has been renewed four times.
5. PW1 produced a liquidation order dated 27th July 2016 cancelling the Society's certificate and appointing him as a Liquidator. It was his evidence that the appointment was gazetted vide the Kenya Gazette Notice No 6120 of 5th August, 2016 and that the same gave him the power to act as a Liquidator.
6. According to PW1, after the Kenya Gazette Notice, he called for a meeting of the Mukungugu Farmers' Cooperative Society on 20th September 2016 in Njoro which included the shareholders as provided in the member's register and took over all the assets of the Farmers' Cooperative Society which included movable, immovable assets and the bank account. Further that the meeting was attended by the members, the former official and there were no proxies as the Act does not allow attendance by proxy.
7. PW1 testified that he conducted the liquidation of Mukungugu Farmers' Co-operative Society Limited domiciled in Njoro, Nakuru and that an inquiry over the Mukungugu Farmers Cooperative Society had been done which recommended the surcharging of some former officials for misappropriation and mismanagement. He stated that the former officials were Samuel Githuku Githungu, Garson Kinyanjui, Samuel Kariuki Njoola, Mary Wanjiku and Hannah Minywe who were subsequently surcharged at the Co-operative Tribunal Nairobi.
8. It was PW1's case that the members resolved that idle land be disposed of and the shareholders share the proceeds who were identified by a list that the former officials gave him. He further stated that the meeting was to explain the powers and responsibilities of the Liquidator and hence prepared a scheme of distribution and state of affairs for approval by the Commissioner.
9. PW1 stated that during the process, the 2nd Defendant who was not a shareholder sued vide Judicial Review No 27 of 2016 which was challenging the manner in which the appointment of the liquidator



- and the liquidation was done. That this led to the stoppage of the liquidation process for about one year to wait for the judgment in the case which was subsequently dismissed on 7th December, 2017.
10. It was PW1's testimony that 2nd Defendant filed another Judicial Review in 2018 which was also dismissed by Justice Ngugi on 31st May, 2018. Further that he was stopped temporarily by the court but the said orders were vacated and his term extended on 8th February, 2019 and gazetted the same year.
 11. According to PW1 he had to do a statement of affairs and another scheme of distribution to the Commissioner which he endorsed and gave them a go ahead in May 2019 and that he appointed Dean and Smith Audit firm to assist to ensure the distribution scheme is perfect. That he later appointed Prime Line Surveys to undertake demarcation of Mukungugu properties including the idle lands to be sold and followed the members' instructions.
 12. PW1 stated that they subsequently surrendered some land to the Ministry of Education to expand Mukwina (now Mukungugu primary school) as desired by the members but the former officials moved to the Cooperative Tribunal seeking that they be given land on the basis that they owned the land allegedly bought from the society. Further that he has not completed the liquidation due to the interference of the defendants hence needs an order to allow him to finalize the mandate.
 13. Upon cross-examination by Mrs. Mbeche, PW1 confirmed that he called a meeting in September 2016 of members after appointment and gazettement and that the minutes of 6th December, 2012 were of the former officials of the Plaintiff. PW1 testified that he was present at that meeting of 6th December, 2015 and that he had attended as a guest.
 14. According to PW1 the Commissioner gave him authority to act as a Liquidator as officials of the cooperative do not appoint the liquidator. PW1 stated that he used the original members register and that they had quorum as 162 members attended. PW1 stated that the members did not sign anywhere to show their presence at the meeting.
 15. PW1 testified that by the time of his appointment, majority of the members had gotten their plot and was told by the Commissioner that members had labelled the plots as idle and that the school and the water point were the only public utilities.
 16. PW1 stated that he has sold about four plots and four are remaining and that he does not know whether there was any cattle dip, further that the liquidator takes instructions from the Commissioner and it is not true that the members were objecting.
 17. Upon re-examination by Mr. Karanja, PW1 testified that the members decided to sell the idle plots and that he exercised his powers to dispose of them and that it was not necessary to attach the attendance list. PW1 stated that members do not counter-sign the members register in a cooperative society.
 18. PW1 further confirmed that he disposed of the plots with the help of the members which he did legally as a Liquidator and that the Act gives the Liquidator authority to dispose and distribute to take care of the debt and expense of the liquidation.
 19. PW1 stated that all the Defendant are not members of the society and they did not attend the meeting and that the Cooperative *Societies Act* does not provide for attendance by proxy. Further that his appointment as a Liquidator has never been challenged by the members

Defendants' Case

20. DW1 Richard Kinuthia Githua adopted his statement dated 7th May 2020 as his evidence and produced a list of documents as DExh No 1 to 20. He testified that his late father, Githua Kangeri was the original



member of Mukungugu Farmers Society and he passed away on 3rd February, 2019 and that he was granted letters of administration.

21. DW1 testified that he became a member of the society after the death of his father in May, 2019 and started interacting with members of the society after he became an active member but he is not an official of the society.
22. DW1 testified that after the Commissioner of Co-operatives dissolved the society vide an order dated 27th July 2016 under Section 62 (1) (c) of the Cooperatives *Societies Act*, the members complained about the manner in which it was dissolved as it was done without the authority of the members.
23. According to DW1, it is not true that the society had failed its objectives as it had bought land and settled its members in 1978 and that all the 160 members were issued with 2.5 acres of land. DW1 testified that public utilities plots were set aside for the members' future use and that out of the eight plots, the cattle dip was in use, plot No 326 for AI, Artificial insemination, plot No 327 had a water tank, plot No 329 had a Catholic church, plot No 330 was a farm house, plot No 331 a nursery school, plot No 333 had a borehole and plot 334 had a public park.
24. It was DW1's further evidence that after distribution, the society members wrote a letter to the Cooperative Manager Nakuru complaining of the manner in which the society was dissolved whereby they filed a judicial review in the High court, sought assistance of the National Land Commission, and filed restrictions against the public utilities, which are still in place.
25. Upon cross-examination by Mr. Karanja Mbugua, DW1 stated that he is giving evidence on behalf of the four defendants and have provided the defendants' copies of title deeds apart from the letters of administration, further that they have never been members of the society.
26. DW1 also stated that the members were not issued with share certificates and that he was dissatisfied with the dissolution of the society but did not file a case at the tribunal. DW1 admitted that he was aware of the case at the Tribunal, which was filed non-members of the society and did not know the outcome of the case. He also admitted the 2nd Defendant challenged the appointment of the Liquidator vide *Judicial Review No 27 of 2016* Nakuru High Court but the same was dismissed on 31st May, 2018 by Justice Ngugi and that they did not file an appeal.
27. DW1 was referred to a letter dated 27th January, 2020 and stated that they signed the letter issuing notices as a member and not an official. Further that he does not know the membership numbers of the Defendants who signed the letter. DW1 stated that the liquidator had encroached on the public utility plots and that is the reason they complained to the National Land Commission.
28. Upon re-examination by Mrs. Mbeche, DW1 stated that they have attached all the letters and the title deeds.

Plaintiff's Submissions

29. Counsel for the Plaintiff filed submissions dated 14th August, 2024 and submitted that the Defendants have not adduced any evidence why the Plaintiff should not be granted the reliefs sought.
30. Mr. Karanja Mbugua submitted that the Plaintiff has established its case to the required standard and relied on the cases of *Mesback Kirimi Mwithimbu & 7 others vs Liquidator, Nkuene Farmers Co-operative Society Ltd & 16 others Nyeri High Court ELRC Cause No 49 of 2013* Formerly Meru High Court Civil Case No 34 of 2005 and *Kenton Kijabe Co-operative Society Ltd vs Liquidator, Kenton Kijabe Co-operative Society Ltd & 5 others NAKURU H.C.C.C No 63 of 2012*, and urged the court to allow the Plaintiff's claim with costs and dismiss the Defendant's counter claim.



Defendants Submissions

31. Counsel for the Defendant filed submissions dated 23rd August, 2024 and identified the following issues for determination:
 - a. Whether the Defendants are members of the society?
 - b. Whether the liquidator used his powers in accordance with the law?
 - c. Whether the suit properties were available for sale?
 - d. Whether the Defendants intimidated the liquidator?
32. On the first issue, counsel submitted that the 1st Defendant by virtue of the death of his father, and on issuance of a certificate of grant, he de facto became a member of the society and relied on Section 39 (1) of the *Co-operative Societies Act* of 1997. Counsel submitted that the Plaintiff never disputed the membership of the 2nd to 6th Defendants and urged the court to find that the Defendants are members of the society.
33. On the second issue, counsel submitted that the Defendants have prima facie established that the parcels of land Njoro/Njoro Block 1/326 (Mukungugu), Njoro/Njoro Block 1/328 (Mukungugu), Njoro/Njoro Block 1/329 (Mukungugu), Njoro/Njoro Block 1/330 (Mukungugu), Njoro/Njoro Block 1/331 (Mukungugu), Njoro/Njoro Block 1/332 (Mukungugu), Njoro/Njoro Block 1/333 (Mukungugu) and Njoro/Njoro Block 1/334 (Mukungugu) are all public utility lands and at no particular point in time were they available for sale and relied on Section 35 of the *Land Registration Act* and search certificates annexed as documents of the 1st Defendant. Counsel further cited the cases of *Jane Muthini Matiliku vs Veronica Makau* [2022] eKLR and *Kibagenge Farmers' Co-operative Society Limited & 4 others vs Isaac Kipleting Maiyo & another* [2020] eKLR.
34. On the third issue, counsel submitted that the procedure followed by the liquidator was flawed and his actions were not in the interest of the society or its members and relied on Section 66 (g) and (h) of the *Co-operative Societies Act*.
35. On the fourth issue, counsel submitted that no evidence has been tendered to show how the alleged intimidation happened and urged the court to allow the Defendant's counterclaim and dismiss the Plaintiff's case.

Analysis And Determination

36. The issues for determination are whether the Liquidator was legally appointed, whether he used his powers and mandate lawfully, whether the Plaintiff is entitled to the orders of injunction, whether the utility plots were available for sale under Liquidation order and whether the defendants are entitled to the orders sought in the counterclaim.
37. The court has enumerated the comprehensive evidence of the parties and how the Commissioner of Co-operatives put the Plaintiff Company under liquidation. A brief background to the case is that on 5th December, 2015 Mukungugu Farmers' Cooperative Society convened a meeting as required by the Cooperative *Societies Act* in which they passed a resolution that the society be dissolved, its registration certificate cancelled by the Commissioner for Cooperative Development and Marketing and then it be liquidated.
38. It is on record and not disputed that the Liquidator was appointed by the Commissioner for Co-operative Development under Section 65 of Cap 490 vide a Kenya Gazette Notice No. 6120 of 5th



- August 2016 which gave him powers to act as a Liquidator. He produced a liquidation order dated 27th July 2016 cancelling the Society's certificate and appointing him as a Liquidator.
39. It is further on record that the 1st and 2nd defendants filed Judicial Review No 27 of 2016 challenging the manner in which the appointment of the liquidator but the same was dismissed on 7th December, 2017. The 2nd Defendant also filed another Judicial Review in 2018 which was also dismissed by Justice Ngugi on 31st May, 2018.
40. Section 65 and 66 (1) b of the Cooperative Societies Act Cap 490 provides that:
65. Where the registration of a co-operative society is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be liquidator or liquidators of that society (hereinafter referred to as the liquidator) and all the property of such society shall vest in the liquidator from the date upon which the order of cancellation takes effect.
66. The liquidator shall, subject to this Act, have the following powers—
- b) to institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the society; amongst other powers.
41. Individuals can only be allowed to sue in their personal capacity by virtue of Section 69 of the Act which provides that:
- 69.
- (1) A person aggrieved by any order or decision of the Commissioner or the liquidator under section 66 or section 68, as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision.
- (2) A person aggrieved by a decision of the Tribunal under subsection (1) may appeal to the High Court within thirty days of the decision.
42. The Defendants filed a case at the Cooperatives Tribunal which was dismissed and they admitted that they did not appeal that decision within the stipulated period as per section 69 (2) of the Co-operatives Act. It follows that the appointment of the Liquidator was legal and provided for under Section. It means that they were satisfied that the Liquidator was lawfully appointed. I find that the Liquidator was lawfully appointed hence had the mandate to perform his duties as stipulated in the Act.
43. As I had already enumerated above, the Liquidator gave a chronology of the activities that he did with the approval of the Commissioner of Co-operatives and with the concurrence of the members. He stated that after appointment vide the Gazette Notice he called for a meeting with members of Mukungugu Farmers' Cooperative Society on 20th September 2016 in Njoro which included the shareholders as provided in the members' register and took over all the assets of the Farmers' Cooperative Society which included movable, immovable assets and the bank account. Further that he prepared a report on the state of affairs of the Society for the approval by the Commissioner which was approved.
44. It was the Plaintiff's case that he authorized to give some properties to Mukungugu Njoro Primary School (currently under Teachers Service Commission and Ministry of Education through the Director of Education Njoro Sub-county) and water collection and supply point.
45. It was further the Plaintiff's case that he was authorized to sell all idle plots described as Njoro/njoro Block 1 (mukungugu) (a) Cattle Dip Plot No 332 (2), Njoro/njoro Block 1 (mukungugu) (a) Artificial



- Insemination (a.i) Plot No 326 (3) And Njoro/njoro Block 1 (mukungugu) (a) Market Place Plot No 334 and proceeds thereof be subdivided among all members.
46. The Plaintiff also stated that he acted on the instructions and advertised for sale and subsequently sold some of the land parcels comprised in Njoro/njoro Block 1 (mukungugu) (a) Catle Dip Plot No 332 (2), Njoro/njoro Block 1 (mukungugu) (a) Artificial Insemination (a.i) Plot No 326 (3) And Njoro/njoro Block 1 (mukungugu) (a) Market Place Plot No 334.
 47. The main complaint by the plaintiff is that the defendants illegally used the letter head of the defunct society to defraud the community and that they have invaded the aforementioned parcels of land through police intimidation and destroyed the property belonging to the bona fide proprietors of the parcels of land who bought the land from the Plaintiff.
 48. The Plaintiff having been appointed as Liquidator had the powers to deal with the properties of the society in liquidation. The suit plots complained off were part of the assets to be liquidated. It should be noted that it is the members of the Society who made a resolution to dissolve the company and wrote to the Commissioner of Cooperatives who acted on their request. The defendants who were aggrieved had an opportunity to express their grievance as provided for but the case at the Tribunal and the Judicial Reviews were dismissed. We are therefore past the stage of addressing the grievance on the appointment of the Liquidator and how the liquidation has been done. The Liquidator's task is not yet complete due to the interference by the defendants.
 49. I find that the Plaintiff has proved his case on a balance of probabilities and that the defendants' counterclaim is an afterthought and have not proved their claim against the Plaintiff. There is no evidence that the Plaintiff has mismanaged the funds or acted ultra vires his mandate. The Plaintiff cannot act unilaterally, as he is guided by Act and under supervision by the Commissioner of Cooperatives. There is a requirement of periodical updates on the progress of liquidation and the term has to be extended from time to time when the Commissioner deems necessary for the fulfilment of the mandate
 50. It should also be noted that some of the public utilities have been given to a School, which is a public school for the benefit of the community. There is no evidence that the liquidator is acting for personal benefit. The Society having been put under liquidation and the same has not been lifted, whose benefit are the defendants seeking the orders for damages.
 51. I have considered the pleadings, the evidence on record, the submissions by counsel and the relevant authorities and find that the plaintiff has proved his case and is therefore allowed as prayed. The defendants have failed to prove their counterclaim and is therefore dismissed with costs.
 52. Consequently, I make the following specific orders:
 - a. An order of a permanent injunction is hereby issued restraining the Defendants by themselves, their agents, their servants, their employees from dealing with, interfering with or in any way disrupting the Plaintiff from fulfilling his mandate of liquidating Mukungugu Farmer's Cooperative Society which includes sale of the parcels of land described as Njoro/njoro Block 1 (mukungugu) (a) Catle Dip Plot No. 332 (2), Njoro/njoro Block 1 (mukungugu) (a) Artificial Insemination (a.i) Plot No. 326 (3) And Njoro/njoro Block 1 (mukungugu) (a) Market Place Plot No. 334.
 - b. Defendants' counterclaim is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF OCTOBER 2024.

M. A. ODENY



JUDGE

