



Motor Farmers Co-operative Society Limited v Chelule & 6 others (Environmental and Land Originating Summons E001 of 2020) [2024] KEELC 7223 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2020
A OMBWAYO, J
OCTOBER 30, 2024**

BETWEEN

MOTOR FARMERS CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

PETER CHELULE 1ST RESPONDENT

ELIZABETH WANGUI NJENGA & 5 OTHERS & 5 OTHERS & 5

OTHERS 2ND RESPONDENT

JUDGMENT

Introduction

1. The Plaintiffs commenced this suit vide Originating Summons dated 6th October, 2020 against the Defendants seeking the following orders:
 - a. Whether pursuant to the decision and orders made in Nakuru High Court Civil Appeal No 95 of 2015 delivered by Hon. Justice Rachel Ng'etich on the 11th July 2019 the Plaintiff should be declared is the legal proprietor of all that parcel of land known as Grant No. 1. R 9716 LR NO. 533/87/II
 - b. Whether the Title to all that parcel of land known as Grant No. LR 9716 L.R NO. 533/87/II in the names of the late Simon Njenga Wainaina and the late Joseph Chege Nduguga ought to be cancelled and the same be restored to the Plaintiff by the Interested Party.
 - c. Whether an order for eviction order and a permanent injunction should be issued against the 2nd 3rd 4th and 5th Defendants restraining them either by themselves, their agents, servants, successors, employees or anyone claiming in their names from continued occupation, collection of rent or in any way interfering with the occupation, use and possession of the suit



property by the Plaintiffs upon determination of this suit and that the same be supervised and enforced by the Area Officer Commanding Station.

- d. Whether The rent collected by the Defendants since 19th December 1995 ought to be paid to the Plaintiff as per the assessment of a court appointed valuer
 - e. Whether the Plaintiff is entitled to an award of general damages arising from the illegal actions perpetrated by the Defendants jointly and/or severally.
 - f. Whether the Defendants ought to pay the costs of this suit.
2. The summons was supported by the grounds as listed and the supporting affidavit by the Plaintiff's counsel Ibrahim Ngugi Kariuki sworn on 6th October, 2020. The 4th Defendant filed his Replying Affidavit sworn on 2nd December, 2020 where he averred that a claim for the recovery of the suit property could not be brought by the Plaintiff after 12 years have already lapsed. He further averred that the 2nd to 5th Defendants are heirs of the 6th and 7th Defendants and the registered proprietors of the suit property. He added that the same was by virtue of the land having been purchased by the 6th and 7th Defendants in 1995. The 4th Defendant averred that the Plaintiff was dissolved by an order of the Commissioner of Co-operative Development on 5th July, 1995 and the 1st Defendant appointed the liquidator. He further averred that the 6th and 7th Defendants lawfully purchased the suit property for value and in good faith after it had been advertised. He further averred that the 2nd to 5th Defendants acquired the suit property by virtue of succession thus obtained a good title. He averred that the Plaintiff filed a case in Nakuru CMCC 1804 of 1995 where the court on 15th May, 2015 dismissed the Plaintiff's case having failed to prove that the Defendants fraudulently acquired the suit property. He averred that the Plaintiff being aggrieved with the said judgment filed an appeal in the High Court being Nakuru Civil Appeal No. 95 of 2015. The 4th Defendant averred that the high court found that the trial court lacked the jurisdiction to hear the case and granted orders in favour of the Plaintiff. He averred that the high court erred by issuing positive orders after finding that the trial court lacked jurisdiction. He further averred that the 2nd to 5th Defendants have preferred an appeal having been dissatisfied with the high court judgment. He urged the court to dismiss the Plaintiff's case.

Submissions

3. Counsel for the Plaintiff filed his submissions dated 14th May, 2024 where it identified five issues for determination. The first issue was whether or not the Plaintiff Society ought to be declared as the lawful proprietor of all that parcel of land known as Grant No. I.R 9716 L.R NO. 533/87/II. He cited the case of *Macfoy -V- United Africa Ltd* [1961]3 ALL E.R. 1169 at page 1172 and submitted that the judgment in the high court issued orders which have not been challenged in any manner and are therefore binding on the parties to this suit. He also relied on the case of *Daudi Kiptugen - V Commissioner of Lands & 4 Others* (2015) eKLR and Section 26(1) of the [Land Registration Act](#). Counsel submitted that from the evidence on record as well as the circumstances of the case dictate that the title held by the 2nd to 5th Defendants ought to be cancelled and the same be reverted to the Plaintiff herein.
4. The second issue was whether or not an order for eviction and a permanent injunction should be issued against the Defendants. He relied on Section 24(a) of the [Land Registration Act](#) and submitted that from the finding of the high court, it was only fair and just that the court finds that the Plaintiff is entitled to have exclusive use and possession of the suit property to the exclusion of the 2nd to 5th Defendants. He further submitted that the same could only be achieved through the issuance of an eviction order against them as well as a permanent injunction barring them from interfering with the Plaintiff's possession, occupation and use of the same.



5. The third issue was whether or not the rent collected by the Defendants since 19th December 1995 ought to be paid to the Plaintiff as per the assessment of a court appointed valuer. Counsel relied on the case of Madhupaper International Ltd & another -V- Kenya Commercial Bank Ltd & 2 others [2003] eKLR and submitted that 2nd to 5th Defendants did not dispute that they have been collecting rental income from the commercial suit property including the 6th and 7th Defendants who took over the suit property and collected rent. He submitted that since the title was obtained illegally, the proceeds fall squarely within the category of unjust enrichment whose remedy is restitution. Counsel further submitted that by granting the said prayer, it would restore the Plaintiff to a close position to where it would have been without the unlawful deprivation of the use and possession of the suit property.
6. The fourth issue was whether or not the Plaintiff is entitled to an award of general damages arising from the illegal actions perpetuated by the Defendants jointly and/or severally. He relied on the cases of Nakuru Industries Limited -V- S. S. Mehta & Sons [2016] eKLR and Attorney General –VZinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment).
7. Counsel submitted that the Plaintiff was unlawfully deprived of possession and use of its commercial property for an extended period of 29 years which amounted to violation of its right to own and make use of property. He further proposed a sum of Kshs. 8,7000,000/= being a rate of Kshs. 300,000/= for each year the Plaintiff was deprived of the use and possession of the said property.
8. The final issue was on costs where counsel relied on the case of Republic -V- Rosemary Wairimu Munene, Ex-Parte Applicant –Vs- Ihururu Dairy Farmers Co-operative Society Ltd and submitted that the costs of the suit ought to be borne by the 2nd to 5th Defendants.

Analysis and Determination

9. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
 - a. Whether the Plaintiff is under liquidation.
 - b. Whether the suit is time barred.
 - c. Whether the sale of the suit property to the 6th and 7th Defendants was proper.
 - d. Whether the Plaintiff is entitled to the orders sought.
 - e. Who should bear the costs of the suit.
10. In dealing with the first issue, it is important to note that it is trite law that a Cooperative Society is a body corporate capable of suing and being sued in their own names. This is provided for under Section 12 of the Cooperative *Societies Act*, Cap 490 Laws of Kenya which stipulates as follows: “Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.”
11. Further, Section 61 of the Cooperative *Societies Act* provides as follows:
 - (1) If the Commissioner, after holding an inquiry under section 58 or making an inspection under section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.



1. Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, within two months after the making of such order, appeal against the order to the Cabinet Secretary with a final appeal to the High Court.
2. Where no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Cabinet Secretary or by the High Court, as the case may be.

12. Section 81 also provides as follows:

Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

- (2) Upon the hearing of an appeal under this section, the High Court may:—
 - (a) confirm, set aside or vary the order in question;
 - (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
 - (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
 - (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
- (3) The decision of the High court on any appeal shall be final.

13. It is not in dispute that on 5th July, 1995 a notice of liquidation was issued by the Commissioner of Cooperatives. Further, the Plaintiffs members filed an appeal on 21st July, 1995 to the Minister objecting to the sale of its properties. The Minister in his ruling held that the Commissioner's order was based on the wrong facts and that the Society's membership never fell below 10 members. The matter was filed in the subordinate court which dismissed the Plaintiff's case and the Plaintiff appealed in the High Court. It is not in dispute that vide a sale agreement dated 29th November, 1995, the 1st Defendant sold the suit property to the 6th and 7th Defendants. The High court in its judgment found that the 1st Defendant acted ultra vires from the Commissioner in disposing the suit property and that the said acts by the 1st Defendant were a nullity.

14. It is this court's view that in line with the provisions in the above Act, the moment the Plaintiff appealed and the Minister ruled on the same, the issue of liquidation ceased to exist. Further, the High Court delivered its judgment declaring the acts of the 1st Defendant a nullity including the said sale to the 6th and 7th Defendants. Going to the second issue for determination, Section 4 of the [*Limitation of Actions Act*](#) provides as follows:

The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract... [Emphasis mine]

15. In the present case, it is a fact that the Plaintiff became the registered owner of the suit property on 6th October, 1971. The sale of the suit property was on 29th November, 1995 and it is trite law that the statute of limitation for contract is 6 years. It is this court's view that the issue of limitation does



not apply in the instant suit since the Plaintiff filed a case at the subordinate court in 1995, which was within the 6-year period. In addition, the Plaintiff also appealed the decision in the subordinate court in the high court which appeal was determined in the year 2001. I therefore find that the issue of limitation does not suffice hence the suit is not statute barred.

16. On the third issue, this court in determining the same should consider whether the 6th and 7th Defendants were innocent purchasers for value. It is trite law that in order for one to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title and that he paid valuable consideration for the purchase of the suit property. The Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of *Munyu Maina V Hiram Gathiha Maina* [2013] KECA, where the court held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

17. In the instant suit, the sale and transfer of the suit property to the 6th and 7th Defendant’s was challenged. It was therefore the incumbent upon the 2nd to 7th Defendants to prove the root of their title which they failed to do so. As this court had earlier established, the Plaintiff had filed an appeal that stayed the liquidation process thus the sale was irregular since the 1st Defendant lacked the capacity to sell the same to the 6th and 7th Defendant. It is this court’s view that the Defendants failed to conduct their due diligence before purchase of the suit property otherwise they would have discovered that there was an appeal on the said dissolution process that stayed any actions touching on the Plaintiff’s assets. It is also noteworthy that as the High court found, the period stipulated for accepting tenders for the sale of the suit land was advertised and ended on the 22nd August, 1995 yet the property was sold to the 6th and 7th Defendants on the 29th November, 1995 thus the sale was invalid. This court therefore finds that the 6th and 7th Defendants are not a bona fide purchaser for value without notice since the whole transaction was illegal. Order 37 Rule 19(1) Civil Procedure Rules provides in part as follows:

“Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits”

18. It is noteworthy that the present suit has been lodged by way of originating summons. This court is of the view that the same suffices as a plaint and therefore sufficient to determine the issues at hand. Furthermore, the issues are not complex in nature by virtue of the High court judgment already in place. In the upshot, the Plaintiff’s suit is merited and the same is allowed in the following terms:-
- a. Pursuant to the decision and orders made in Nakuru High Court Civil Appeal No 95 of 2015 delivered by Hon. Justice Rachel Ng’etich on the 11th July 2019 the Plaintiff should be and is hereby declared as the legal proprietor of all that parcel of land known as Grant No. 1. R 9716 LR NO. 533/87/II



- b. That the Title to all that parcel of land known as Grant No. LR 9716 L.R NO. 533/87/II in the names of the late Simon Njenga Wainaina and the late Joseph Chege Nduguga ought to be cancelled and the same be restored to the Plaintiff by the Interested Party. The interested party is hereby ordered to cancel the title issued in the names of the late Simon Njenga Wainaina and the late Joseph Chege Nduguga and register the parcel of land in the names of the plaintiff.
- c. The 2nd, 3rd, 4th and 5th defendants to vacate the parcel of land within 90 days failure of which an order for eviction is hereby issued. The Defendants to pay the costs of this suit.
19. On the issue of rent, this court is of the view that the same is overtaken by events since a valuer was never appointed.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

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THE JUDICIARY OF KENYA

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