



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 154 OF 2018

TEMBO COOPERATIVE INVESTMENT LTD.....1ST APPELLANT

TEMBO SACCO SOCIETY LTD.....2ND APPELLANT

VERSUS

SAMUEL O.NYAMBANE.....RESPONDENT

(Being an appeal from the judgement of the Hon. Mr. Alex Ithuku (chairman), Ms. Cecilia Kithinji (Vice chairman) and Mr. F. F. Odhiambo (Member) dated the 8th day of March 2018, in the Cooperative Tribunal at Nairobi, Tribunal Case no. 530 of 2014.)

JUDGEMENT

1. Samuel Nyambane, the respondent herein filed a claim before the Cooperative Tribunal against the appellants herein whereof he sought for payment of ksh.500,000/= being the value of his plot no. 57, Tembo Housing Estate (Kibos). He also sought for payment of ksh.15,000/= being special damages plus costs of the claim. The Cooperative Tribunal heard the claim and by its judgment delivered on 8th March 2018, judgment in favour of the respondent in the sum of ksh.500,000/=.

2. The appellants being aggrieved preferred this appeal and put forward the following grounds of appeal.

i. The learned Tribunal Chairman and Members erred in law and in fact in dismissing the appellants' case.

ii. The learned Tribunal Chairman and Members erred in law and in fact in failing to take into account consideration all the evidence and facts adduced at the trial.

iii. The learned Tribunal Chairman and Members erred in law and in fact in holding that the appellants had failed to prove their case.

iv. The learned Tribunal Chairman and Members erred in law and in fact by not taking into consideration the applicable laws namely the Cooperative Societies Act (Cap 490)

v. The learned Tribunal Chairman and Members erred in law and in fact by equating the respondent's share certificate for plot no. 57, that was issued by the appellants with a letter of allotment issued by the Commissioner of Lands under the repealed Registration of Titles Act and Registered Lands Act.

vi. The learned Tribunal Chairman and Members erred in law and in fact in finding and holding that the ownership of the appellant over plot no. 57 in the suit property conferred upon him absolute ownership rights.

vii. The learned Tribunal Chairman and Members erred in law and in fact by adopting and affirming the holding in Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another, Kisumu HCCA no. 9 of 2004 (as cited in Commissioner of Lands and Another vs Kithinji Murugu Magere, (2014) eklr, without considering the fact that this authority arose from a letter of allotment issued by the Commissioner of Lands under the authority of the repealed Registration of Titles Act and Registered Lands Act and was thus distinguishable from the appellants and respondent's case wherein the letter of allotment therein was issued by a private entity, the appellants to the respondent, and as such was unenforceable.

viii. The learned Tribunal Chairman and Members erred in law and in fact in that, having found that there were two parcels of land Lr nos. 645/52 and 654/1A (the suit property) which had to be amalgamated and then subdivided into plots, one of which was allotted to the respondent, and that the lease of parcel no. 654/52 had expired before the subdivision exercise could be completed, failed to find and hold that the whole exercise of amalgamation and subdivision was rendered impossible and therefore could not be carried out since the substratum of the contract between the appellants and the respondent, the

amalgamation and subdivision of the suit property, had thus failed and the appellants could not execute on their part that which had been rendered impossible.

ix. The learned Tribunal Chairman and Members erred in law and in fact in failing to appreciate and hold that the amalgamation and subdivision of the suit property having failed due to the expiry of the lease of Lr. Nos 654/52 due to no party's fault, then the appellants could not be held liable for the sale of the suit property and refund of members funds prorated to match the sale proceeds.

x. The learned Tribunal Chairman and Members erred in law and in fact by finding and holding that the respondent should have been notified of the decision to sell the suit property yet the appellants nationwide organizations and were mandated under the Cooperative Societies Act (Cap 490) to be governed by the delegates system whereby members, including the respondent, were represented by delegates. Additionally the retirees of the appellants' were notified through their organization 'Tembo Wazee Wa Kazi Self Help Group'.

xi. The learned Tribunal Chairman and Members erred in law and in fact in failing to hold and find that the appellants had a right to sell the suit property pursuant the resolution of their validly convened Joint Annual Delegates Meeting held on 20-4-2007.

xii. The learned Tribunal Chairman and Members erred in law and in fact in failing to appreciate the fact that as at March 2017, upon the sale of the suit property, 288 members of the appellants had been refunded their prorated shares in the failed housing scheme from the proceeds of the sale and therefore the award of special damages to the respondent was unfair and unjust as it treated the respondent differently from other 288 share certificate holders who had approved the said sale and had been paid their prorated shares.

xiii. The learned Tribunal Chairman and Members erred in law and in fact in that by awarding damages against the appellants they failed to appreciate and to take into account the fact that the 2nd appellant had spent kshs.17,272,700/= towards the failed project and that the award of such damages amounted to double penalty against the 2nd appellant without any benefit or profit having accrued to it.

xiv. The learned Tribunal Chairman and Members erred in law and in fact in awarding the respondent the sum of ksh.500,000/= as special damages when the same was not specifically proved and was based on an erroneous valuation report whose maker was not called to prove the same.

3. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions.

4. I have re-evaluated the case that was before the Cooperative Tribunal. I have also considered the rival submissions and the authorities cited by the parties. The background of his appeal appear to be short and straightforward. The 1st appellant was formed by the 2nd appellant for purposes of investing for its members benefits, specifically to buy land and thereafter subdivide to members.

5. In the year 1995 the 2nd respondent's members at their Annual Delegates meeting resolved to buy 2 parcels of land in Kibos area of Kisumu being L.R no. 654/52 and 654/1A totaling about 85 acres with the objective of subdividing them into plots and sharing to members at a cost. In 1997 the 2nd appellant invited its members to apply for plots at a cost of kshs.42,000/=. The respondent produced a share certificate showing that he purchased plot no. 567 in the proposed housing scheme. The respondent complained that when he left the country to work in Canada his plot was sold and dispossessed of his property.

6. He filed a claim before the Cooperative Tribunal where he produced a valuation report showing that at the time of filing the claim the plot was valued at ksh.500,000/=. He asked the Tribunal to order the appellants to pay him the value of his plot. The respondent denied authorizing the sale of the plot and stated that he was not invited to any meeting. The respondent stated before the Cooperative Tribunal that he was not a member of the 2nd appellant and that the 2nd appellant had no authority to deal with his property.

7. It also turned out that the two appellants were separate and distinct Cooperative Societies. After hearing the parties the Cooperative Tribunal found the case in favour of the respondent and against the appellants is earlier stated hereinabove.

8. On appeal, the appellants put forward a total of 14 grounds.

However those grounds can be determined in three main grounds. The first main ground is whether the appellants were entitled to sell the suit property.

9. It is the submission of the appellants that the appellants were entitled to sell the suit property because the same had not yet passed to the members with shares, including the respondent.

10. The appellants further claimed that the appellants had called an Annual Delegates Meeting (ADM) which resolved that the property be sold and members be refunded their shares on prorata basis.

11. The respondent is of the submission that the appellants were not entitled to sell his property. Having considered the rival submissions, it is apparent that the suit property was sold by the 2nd appellant after being authorized by a resolution made by an Annual Delegates Meeting.

12. The respondent had shown that he was not a member of the 2nd appellant. It is also apparent that the 2nd respondent was not the

registered owner of the same property ie LR no. 654/152 and 654/1A which parcels were registered in the name of the 1st appellant which the respondent is a member.

13. The 2nd appellant could not make a decision for the 1st appellant and therefore the decision to sell the respondent's plot without involving him was illegal.

14. The second broad ground of appeal is whether the respondent was entitled to a refund as sought in the claim. It is the submission of the appellants that once the ADM resolved to sell the suit property and for members to be refunded their money, it would be unfair and unjust to treat the respondent differently by an award of damages of ksh.500,000/= while the other 288 members were paid ksh.18,034/=.

15. The appellants pointed out that the respondent failed to strictly prove his claim and instead relied on a valuation report which was written by a third party who was called to testify before the Tribunal. The appellants argued that the Tribunal ought not to have relied on such evidence.

16. On his part, the respondent is of the submission that he is entitled to be paid the sum he claimed because over time his plot had gained value by the time the appellants were selling the property.

17. The record shows that the respondent relied on a valuation report which indicated the market value of plot no. 57 to be ksh.500,000/=. It is also evident that the valuation report was produced without any objection. This court is also alive of the fact that the Cooperative Tribunal is not bound by the provisions of Section 78(1) of the Evidence Act.

18. In the end, I am satisfied the Cooperative Tribunal did not err in arriving at its decision to award the respondent.

19. This appeal is found to be without merit. The same is ordered dismissed with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondents