REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA 6 OF 2019

NANASI HOUSING COOPERATVE SOCIETY LTD.....1ST APPELLANT

MARGARET WAIRIU MBIRUA.....2ND APPELLANT

VERSUS

JAMES MWANGI KARIUKI.....RESPONDENT

(An appeal from the judgement of Hon. G. Omodho in CMCC NO 289 OF 2009 –Thika delivered on the 24/12/2018)

JUDGEMENT

1. The Appellants filed this appeal vide a memorandum of appeal dated 14/01/2019 against the trial Court Judgment rendered on 24/12/2018 in **Thika CMCC Civil Suit No. 289 of 2008**. The said memorandum of appeal contains nine grounds of appeal THAT;-

a. The trial Magistrate erred in law and in fact in disregarding the evidence and submissions tendered by the 1st and 2nd Appellants.

b. The trial Magistrate erred in law and in fact in holding that allotment letter in respect of the suit property had been issued to the Respondent while none was produced as an exhibit during the trial.

c. The trial Magistrate erred in law and in fact in holding that there was no proof of deadlines for payment yet relevant minutes and resolutions were produced which clearly set out the timelines for making payments in respect of the suit property.

d. The trial Magistrate erred in law and in fact in finding that the 1st Appellant did not have power to repossess the suit property for failure by the 1st Respondent to meet payment timelines, and violating the 1st Appellant's by-laws and resolutions.

e. The trial Magistrate erred in law and in fact in relying on extraneous matters and wrong precedent thus arrived at a wrong conclusion.

f. The trial Magistrate erred in law and in fact in finding that the Respondent met the conditions of purchase of the suit property contrary to the evidence on record.

g. The trial Magistrate erred in law and in fact in holding that the 1st Appellant contravened a Court order while no evidence was tendered to prove that the 1st Appellant processed certificate of lease in favor of the 2nd Appellant.

h. The tribunal (sic) erred in law and in fact as it ignored the 1st Appellant's by-laws No. 22 on guidelines of plot acquisition.

2. The Background of the case is that the Respondent vide his amended plaint dated 4/11/2009 averred that he is the bona fide purchaser of plot No. 325. That the 1st Appellant without any color of right processed a title over the said property in favour of the 2nd Appellant. That on inquiry, he was informed that the 1st Appellant repossessed the plot and re-allocated it to the 2nd Appellant. He sought orders inter alia that; a permanent injunction do issue restraining the defendants from repossessing or interfering with his title and possession of Plot No. 325, Nanasi Estate Phase one (now known as **Thika Municipality Block 14/353**) and that the Certificate of Lease in respect of Thika Municipality Block 14/353 registered in the name of the 2nd defendant be nullified and cancelled and the same be registered in the Plaintiff's name.

3. The 1st Appellant denied the Respondent's claim vide its amended statement of defence dated 10/10/2017. That the Plaintiff failed to comply with the 1st Appellants resolutions dated the 11/2/97, 26/11/99 and 8/10/2000 as well as the notices to the Respondent dated the 27/3/1998, 15/2/2002 and 3/11/2007 calling for payment of the outstanding dues in default of which repossession of the plot would ensue.

Further that the Plaintiff failed to pay entrance fees, transfer fees in full and membership fee and or share fees in contravention of the 1st Appellants bye laws.

4. In a similar fashion, the 2nd Appellant filed her defence dated 8/5/2018 refuting the Respondent's allegations. She averred that she lawfully balloted and acquired the title for land parcel No. 14/353, being the suit property.

5. The trial Court considered the evidence on record before it and rendered its Judgement allowing the Respondent's claim provoking this instant appeal. The Appellants urged this Court to allow their appeal by setting aside the impugned Judgment and dismiss the Respondent's claim with costs.

6. The Appellants filed submissions dated 29/10/2021 through the firm of **Muthomi Milimo & Co. Advocates**. In opposition, the firm of **Jesse Kariuki & Co. Advocates** filed submissions dated 29/10/2021 on behalf of the Respondent.

7. The Appellants submitted three issues for determination; whether the Respondent breached the set timelines for payment as averred in the memorandum of appeal; whether the repossession of the suit property was valid and who bears the costs of appeal.

8. On whether the Respondent breached the set timelines for payment of outstanding dues, it is the Appellant's position that the Respondent allegedly purchased the suit property from one Evans Mburu Muthemba. That the said Evans had fraudulently and irregularly balloted for various plots without making the requisite payments. That in an attempt to redeem, the innocent purchasers who included the Respondent, were required to regularize the pending payments of Kshs. 120,000/= by 15/5/2002. Further, that the Respondent failed to pay Kshs. 20,000/- as required under **By-law No. 22(c).** Thus, the Appellant faulted the trial Court for holding that the Appellant did not demand for the said dues, despite their demand letters (**D.Exh.3**) found at Page 151 and 152 of the Record of Appeal.

9. As to whether the repossession of the suit property was valid, the Appellants were emphatic that the trial Court erred in finding that an allotment letter had been issued in favour of the Respondent yet none was issued or adduced as evidence. This is because according to the notice dated 15/2/2002 served upon the Respondent, it was clear that no plot would be transferred without full payment. As such the 1st Appellant was at liberty to repossess such plots and allocate them to other members, the 2nd Appellant included, without any further notice. Accordingly, the 1st Appellant maintains that it properly exercised its power to repossess the suit property. They cited the decision in **David Moses Gekara v Hezron Nyachae [2012] eKLR** and **Samuel Ngige Kiarie v Njowamu Construction Company Limited & Anor. [2019] eKLR** to buttress the essence of timelines and the necessity to comply thereof. The Appellants further submitted that the Respondent was obligated by clause 13 of the 1st Appellants by-laws to pay Kshs 120,000/- . The said clause set out members' obligations as; to promptly pay up all the required monies and to abide by the Rules and contracts of the Society. That once the notices were issued time became of essence requiring the Respondent to complete payments due to the 1st Appellant.

10. Further the Appellants contend that the Court received no evidence to show that the 1st Appellant processed the title in favour of the 2nd Respondent or that it did so in contravention of a Court order. The Appellants faulted the trial Court in reaching a conclusion unsupported by evidence

11. It was the submissions of the Appellants that the Respondent was not issued with a letter of allotment because of the default in making the payments despite being given time to redeem the suit land thus forcing the 1st Appellant to proceed pursuant to clause 20 of its bye laws to repossess the land. That the 1st Appellant had the requisite power to repossess the suit land and faulted the trial Court for holding otherwise. That the repossession of the suit land from the Respondent was occasioned by two reasons; the failure by the Respondent to pay Kshs 120,000/- as notified vide the letters dated the 27/3/98 and 15/2/2002 and secondly the violation of the 1st Appellant's bye laws and resolutions.

12. The Respondent submitted that the Court rightly considered the evidence before it specifically the exhibits and oral evidence of PW1.

13. As to whether the allotment letter had been issued to the Respondent, the Respondent was emphatic that he produced the ballot for the suit land together with the receipt of Kshs 1000/- dated the 22/8/97 as well as other documents which the learned Magistrate considered in arriving at her decision.

14. On the issue of demands to fully pay for the suit property, the Respondent insisted that the original owner had paid the purchase price in full and therefore the 1st Appellant had no authority to repossess the suit property.

15. In totality , the Respondent supported the trial Court decision as sound and proper and relied on the case **HCCA No. 9 of 2004 Rukaya Ali Mohammed v David Gikonyo Nambacha & Anor.** (*sic*) that once an allotee meets the conditions of purchase, the land in question is no longer available for allotment unless the allocating authority challenges it, or it is acquired fraudulently or the allotment was illegal or against public interest.

16. The Respondent submitted that he never received any demands from the 1st Appellant calling for any outstanding dues. That he purchased the suit land and obtained a letter confirming ownership of the suit signed by the Chairman in favour of the previous owner. That there were no demands that threatened the loss of his ownership of the land. That the previous owner having paid for the land fully, the outstanding payments in form of service payments were not enough to warrant the repossession of the land.

Analysis & Determination

17. The sole issue for determination is whether this appeal is merited.

18. The law on the duty of the first appellate Court is well settled. In the case of **Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court of Appeal stated that the primary role as a first appellate Court is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

19. The background of the case has been aptly captured in the preceding paras and it will not serve any purpose to repeat the same.

20. The 1st Appellant is a Cooperative Society Limited whose main objectives interalia are to promote the economic interests and general welfare of its members in accordance with the Act and Rules. In this particular case the said Society was formed by the employees of Delmonte Kenya Limited. The Society owned land which was subdivided and sold to its members as well as non-members who either purchased directly from the Society or members of the Society.

21. Clause 22 of the by-laws of the 1st Appellant stated as follows;

> **"TRANSFER OF SHARES/PLOTS**
>
> **(a) Subject to the provisions of Section 20 of the Act and subject to the approval of the committee. A member may transfer his/her shares/plots in the society to any other member of the society or to any person whose membership of the society has been approved by the committee.**
>
> **(b) No transfer of share(s) / plot (s) in the society shall be valid and effective if made by member indebted to the society whether such debt is due for payment or not.**
>
> **(c) No transfer of share(s)/plot (s) in the society shall be valid and effective until such transfer has been recorded in the register of the society upon payment of Kshs. 20,000/- (twenty thousand shillings) which shall be inclusive of Kshs. 1,000 entrance fee and Kshs. 5,000/- for one share.**
>
> **(d) All plot buyers must become member of the society.**
>
> **(e) All transfers of shares/plots must be approved by the management committee.**
>
> (f) **When for any reason other than death, a member of the society if holding deposit from non-member ceases to be a member he may subject to Section 20 of the Act transfer his/her shares / plot(s) in the society to another member, or a proposed member approved by the committee of the society, but he/she shall not be entitled to repayment from the society of any money paid by him/her in respect of such share(s)/plot (s)".**

22. In this case it is not in dispute that the Respondent purchased the suit land from Evans Mburu Muthemba vide the agreement of sale dated the 29/5/1997. The Plot was described as plot No 325 as shown in the ballot card in the name of the vendor. Vide receipt No 1085 of 22/8/1997 the Respondent paid the sum of Kshs 1000/- to the 1st Appellant being the transfer fees of the suit land from Muthemba to himself.

23. It was the 1st Appellants case that the said Muthemba acquired the plot fraudulently and that the Respondent was conned. That on realizing this the 1st Appellant decided to regularize the acquisition by allowing the new owners to pay the debts outstanding and own the Plots. There was no evidence tabled before the Court to support the fraud/illegality in the acquisition of the suit land by the Respondent and or the said Muthemba.

24. Clause 22 of the Constitution of Nanasi Housing Cooperative Society Limited permitted members to sell land to fellow members of the society as well as any other persons whose membership has been approved by the society. There was no evidence that the Respondent was a member of the society. It has been confirmed by the chairman of the 1st Appellant that Muthemba was a member of the Society. The sale by Muthemba to the Respondent was in line with the rules of the Society. The act of accepting Kshs 1000/- being transfer fees by the society signified that the Respondent's acquisition had been approved and that is why the Society accepted the sum for purposes of processing the transfer. The letter therefore dated the 6/8/96 appears to have been waived by the Society vide the receipt and acceptance of the transfer fees in 1997. The 1st Appellant therefore cannot turn back vide letter dated the 27/3/1998 and purport to demand the sums owed by Muthemba to the Society. Vide the resolution of the Society to assist the members who were allegedly conned by previous officials, the society sanitized the acquisition of the plots if at all there was any taint in the first place.

25. Was the transfer of the land recorded in the society's register? This in my view is an internal action that the Respondent had no control of. The Respondent was issued with a transfer fee receipt which catered for the administrative actions in effecting the transfer from Muthemba to the Respondent. It is on record that the Respondent was never a member of the society. This issue was litigated upto the Court of appeal where the Court rightly determined that the Respondent was not a member of the Society and effectively the provisions of Clause 22 did not apply to him.

26. I have perused the bye laws of the society and find that there is no provision that allowed it to repossess land that was acquired by third parties on account of service fee or infrastructure charges. It is clear that the letter of 1996 called for payment for the provision of services and not consideration for the land, the same having been paid for the shares before Muthemba was allowed to ballot for the land. The 1st Appellant had no interest on the suit land having disposed it to Muthemba prior to 1996. The infrastructure and service fees were payable to the local authority and contractors procured by the society to carry out the infrastructure works on the common areas presumably. That being the case the owners of the lands contributed for the works. If an owner defaulted in paying the services then the consequences of default would be the denial of the common services or the recovery of the same as a civil debt. It cannot be repossession of the land by the 1st

Appellant. The 1st Appellant disposed the land to Muthemba and retained no interest right or estate in the suit land to warrant a recall/repossession of the same.

27. I concur with the decision of the Court in the case of **Rukaya Ali Mohammed Vs David Gikonyo Nambacha HCCA 9 of 2004** where the Court held that once an allotment letter has been issued and the allottee has met the conditions the land in question is not available for allotment. The sale and ballotting of the land by Muthemba conferred upon him absolute right of ownership or proprietorship. There was no evidence led by the Appellants to show that the said acquisition by Muthemba and or the Respondent was tainted nor that the title was impeachable in any way. See the case of **Demutila Nanyama Pururmu v Salim Mohamed Salim [2021]] eKLR** which upheld the trial Court's judgment to dismiss the Appellant's suit that challenging the Respondent's title as fraudulently obtained. The learned Judges were satisfied that the Respondent's title could not be impeached as the Appellant's failed to discharge the burden of proof upon them.

28. It is the 1st Appellants case that the Respondent was issued with notices calling upon him to pay the outstanding dues to no avail. There is no evidence that the said notices were received by Respondent. That said it is on record that the Respondent paid the dues on 31/8/2006, 4/10/2008 and 4/4/2009.

29. For the reasons above and having considered the case, the written submissions and all the material placed before me I do not find any ground to fault the Learned Hon Magistrate in reaching the decision that she did and having found no reason to disturb the said decision I consequently find that the appeal is without merit.

30. It is dismissed with costs to the Respondent.

31. Orders accordingly.

DELIVERED, SIGNED & DATED ON THE 21ST DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

MUTHOMI FOR 1ST AND 2ND APPELLANT

MACHARIA HOLDING BRIEF FOR JESSE KARIUKI FOR RESPONDENT

MS. PHYLLIS – COURT ASSISTANT