



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 77 OF 2004

LOIS HOLDINGS LIMITED:.....:PLAINTIFF

VERSUS

NDIWA TAMBOI & 184 OTHERS:.....:DEFENDANTS

J U D G E M E N T

INTRODUCTION

1. This suit was originally filed against 54 defendants on 2/10/1991. It had been filed in Eldoret High Court as HCCC NO. 207 of 1991. The suit was later transferred to Nakuru High Court on 12/3/1992. The transfer was as a result of an application made by the defendants counsel who felt that the Eldoret High Court could not hear the Civil Case, the same court having handled an appeal from conviction of the defendants in a Criminal case arising from the Senior Resident Magistrate's Court at Kitale.

2. The High Court at Nakuru transferred the case to Nairobi on the 13/5/1992 on the ground that there were many cases at the station. The file was assigned Nairobi HCCC No. 4090 of 1992. At some stage the suit was dismissed for want of prosecution. The dismissal was later set aside. The plaintiff thereafter proceeded ex-parte and obtained judgement against the defendants. The ex-parte judgement was later set aside. Before the ex-parte judgement, the defendants advocate had applied that the case be transferred from Nairobi to either Kakamega or Kisumu on the ground that it was expensive for the defendants who were based in Kitale to be travelling to Nairobi for hearing. An order was made on 12/3/1993 transferring the case to Nakuru. For unknown reasons, this order was never acted upon. The file was transferred to Kitale High Court eleven (11) years after the said order. The order transferring the file to Kitale was contained in a ruling delivered on 2/7/2004. This is a ruling which set a side the ex-parte judgement which the plaintiff had obtained.

3. The court allowed other defendants to come into the suit. This increased the defendants number to 185. The plaintiff is claiming the following reliefs against the defendants;-

(a) Vacant possession of the pieces of land namely LR 6416/6, LR 5335/2 and LR 6485.

(b) Permanent injunction restraining all the defendants, their agents, servants and relatives, from occupying, cultivating farming, digging, grazing or in any way dealing with suit land.

(c) General damages for trespass.

(d) Costs.

(e) Interest on (b) and (c).

(f) Any other or further remedy which this Honourable court may deem fit to grant.

4. This case has been pending in court for long. It is said that a number of defendants particularly the original defendants are dead. There were no substitutions made even after the court gave a general order that they be substituted. The defendants counsel did not do anything to this effect. It is therefore not possible for the court to know who is dead and who is alive. However be that as it may, a judgement has to be given in this case.

PLAINTIFF'S CASE

5. The plaintiff is a Limited liability Company which was incorporated on 29/6/1979. The company had two directors that is Jason Kiamba Kimbui (PW1) and his wife Lois Nyegera Kimbui. PW1 testified the company is the registered owner of LR NO. 6416/6, LR 6485 and LR 5335/2 (Suit lands). Between 1984 and 1985 Lois Holdings Limited (The company) bought the suit lands from Ite Farmers Co-operative Society Ltd. The suit lands were duly registered in the name of the company.

6. At the time the company bought the suit lands, there were 54 people who were employees of the original owner of the suit lands only identified as a Mr Gadher. Ite Farmers Co-operative Society ltd had inherited these 54 workers from Mr Gadher. When the company bought the suit lands the vendors informed PW1 that all the 54 workers had been paid their wages. The company which had bought the suit land did not want to take on board the former workers. The workers were living in one area of the suit land. The company wanted the 54 former workers of Ite Farmers Co-operate Society to move out of the suit lands but they declined to do so.

7. PW1 testified that the 54 former workers turned round and claimed that they were squatters on the suit lands. The 54 had initially occupied one area of the suit lands but with time, they spread over to the entire suit lands. In 1986 the company commenced private prosecution of the 54 persons on the suit lands vide Kitale Senior Resident Magistrate's Court Criminal Case No. 3409 of 1986. All the 54 persons were convicted of two counts facing them. The charges related to trespass to private property. They were ordered to vacate the suit lands.

8. The 54 persons were aggrieved with the conviction. They moved to Eldoret High Court where they filed an appeal against the conviction. The appeal was dismissed for want of prosecution on 28/7/1987. The 54 persons who had been convicted in the criminal case are the ones the company sued in this case. PW1 testified that the defendants have tried to file cases against the company seeking to be declared owners of the suit lands by adverse possession but all the cases have been dismissed for want of prosecution. Some of the cases were given as Kitale HCCC NO. 51 of 2004 and Kitale HCCC NO. 49 of 2004.

9. The company's director testified that the suit lands are about 779 acres and that if he were to lease out the suit lands, he would get Kshs.5,000/= per acre per year. He testified that this would give him about Kshs.3,000,000/=. He contends that the company did not authorize the defendant to be on the suit land and that the court should order eviction of the defendants from the suit lands and award the company general damages and costs of the suit.

DEFENDANTS CASE

10. The defendants contend that they are squatters on the suit lands. In early 80's they got information from one a Mr Kinyanjui who had leased land from Ite Farmers Co-operative Society Limited that the society was selling its land. As they were squatters on the suit lands, they came together and formed a group called Nabakhwana Self Help Group. They wanted to buy part of the suit lands from Ite Farmers Co-operative Society Limited. One of the suit properties was being sold for Kshs.600,000/=. The members approached Jason Kiamba Kimbui who was a General Manager with Co-operative Bank of Kenya. Mr Kimbui advised the members that it was not prudent to form a self help group. He advised

the members to incorporate a Co-operative Society and open an account with Co-operative Bank so that they could apply for a loan for purchase of the property.

11. Mr Kimbui offered to assist the members to incorporate a society. Some members went to Nairobi where Mr Kimbui assisted them to incorporate Nabakhwana Farmers Co-operative Society Ltd. The members opened an account with Co-operative Bank on advise of Mr Kimbui. They then raised Kshs.350,000/=. This money was not enough to buy one of the properties which was going for Kshs.600,000/=. Mr Kimbui promised to assist them secure a loan for purchase of the property. As the members were waiting for the loan to be processed, Mr Kimbui wrote to them and informed them that the property they wanted to buy had already been sold to someone else. The members later learnt that Mr Kimbui had already bought the same property through the plaintiff company in this case. The defendants now contend that Mr Kimbui breached the trust they had in him by buying the property while pretending that he was assisting them.

12. The defendants contend that Mr Kimbui through his company should not be allowed to benefit from the breach of trust owed to them. They contend that they should be allowed to refund the money which the company paid so that they can be allowed to keep the land which they are occupying. The defendants say that they are squatters and that they have lived on the land since it was owned by Mr Gadher. The defendants contend that since they have been on the suit lands for a period of over 12 years, they should be allowed to retain it on ground that they have acquired it by adverse possession.

ISSUES FOR DETERMINATION

13. I have carefully gone through the evidence adduced by the plaintiff's witnesses as well as the defendants. I have also gone through the submissions by counsel for the parties. The issues which emerge for determination are as follows:-

- (a) Whether the plaintiff is the owner of the suit lands.***
- (b) Whether the plaintiff breached trust owed to the defendants in acquisition of the suit lands.***
- (c) Whether the defendants have acquired rights to the suit properties by adverse possession.***
- (d) Whether the plaintiff is entitled to the orders sought.***
- (e) Whether the suit is properly before the court.***

ANALYSIS OF EVIDENCE

14. There is evidence from the plaintiff that it is the registered owner of the suit lands. The plaintiff produced a sale agreement between it and Ite Farmers Co-operative Society. This agreement is in respect of LR Nos 6485 and 6416/6. The agreement was entered into on 7th August, 1984. The agreement was produced as exhibit 3. The plaintiff also produced certified copies of certificate of titles in respect of the two properties as exhibit 4. An application for consent of land control board and letter of consent in respect of the two properties were produced as exhibit 6 and 5 respectively.

15. It is clear from the defendants defence that they do not have any issues with regard to LR Nos 6485 and 6416/6. They only seem to have an issue with LR 5335/2. Though it is indicated in the proceedings in the court file that the plaintiff produced copies of titles in respect of the three properties, what was actually produced are copies of two titles for LR 6485 and 6416/6. A copy of title in respect of LR No. 5335/2 was never produced. It is not clear when the plaintiff bought LR 5335/2 as no agreement was produced. The plaintiff did not also produce an application for consent of the land control board in respect of this property. There is only a copy of certified letter of consent in which the land control board gave its consent on 11th July, 1985. It is however clear from the plaintiff's list of documents that this property was transferred to the plaintiff on 19th December, 1985. It is not contested that the three properties are registered in the plaintiff's name. I therefore find that the plaintiff is the owner of the three

properties.

16. On the second issue as to whether there was a trust owed to the defendants by Mr Kimbui, it is admitted by the plaintiff in its submissions that Mr Kimbui owed a duty of trust to the defendants. The plaintiff only contends that there was no breach of that trust. There is no dispute that Mr Kimbui was the General Manager of Co-operative Bank of Kenya. Mr Kimbui admitted during the hearing of Criminal case No. 3617 of 1990 that he is the one who assisted the defendants to incorporate Nabakhwana Farmers Co-operative Society and that the members opened an account with Co-operative bank and deposited money in the account. The purpose of opening the account was to secure a loan to buy land. The land which the defendants wanted to buy was one of the parcels owned by Ite Farmers Co-operative Society Ltd. On 5/11/1984 the acting District Commissioner Trans-Nzoia wrote a letter to the Chairman of Ite Farmers Co-operative Society Ltd complaining about the society's act of selling land without considering the plight of the squatters who were on it. This letter was produced as defence exhibit 2.

17. PW2 John Karume Kiguru was the Chairman of Ite Farmers Co-operative Society Ltd. He was called as a witness for the plaintiff. During cross-examination, he admitted that the society had received letter dated 5/11/1984 in which the acting DC Trans-Nzoia was pleading with the society to at least spare 100 acres for the squatters. He admitted that the society at first sold two portions and reserved a third portion to the squatters. The two portions which had been sold were LR 6485 and 6416/6. The one which was reserved for the squatters was LR NO. 5335/2. Though this witness said that this property was sold to the plaintiff after the squatters failed to raise the amount required, this is not true. Mr Kimbui had promised the squatters that he was going to assist them to buy the land. He even assisted them to incorporate a society. The squatters opened an account and they deposited money. As they were waiting for the loan to be processed, Mr Kimbui wrote them a letter dated 27/3/1986 in which he stated as follows;-

“RE: YOUR APPLICATION FOR KSHS.2 MILLION LAND PURCHASE

We refer to your above application which was received by us late 1985. We have now reliably learnt that the farm you intend to buy has been sold to other buyers.

We would like to know whether you are still interested in pursuing this application”.

18. Mr Kimbui was writing this letter well aware that his company had already bought the land. The argument by PW2 that they sold LR 5335/2 to the plaintiff after the squatters had failed to raise money is not true. It is clear that Mr Kimbui bought the land in the name of his company well aware that the squatters were preparing to buy it. He had made the squatters believe that he could assist them buy the land but he breached that trust. The relationship between Mr Kimbui and the members of Nabakhwana Farmers Co-operative Society was one of a banker and his client. Mr Kimbui used the knowledge he had regarding his clients to pull a quick one on them by buying the same property which his clients wanted to buy. Mr Kimbui's argument that he wanted to assist the defendants to buy a farm from Mr Gumo has no basis. The truth is that the defendants wanted to purchase LR 5335/2 which had been reserved for the squatters following intervention by the provincial Administration.

19. DW4 Jonathan Wafula Mutende was the area chief in 1985. He testified on how in 1985 Mr Kimbui went to his office and told him that he wanted to assist the squatters to get a portion of Ite Farmers Farm. He asked him to convene a meeting of the squatters. During that meeting, Mr Kimbui declined to sit at the high table. He sat where the squatters were seated. The meeting was called to re-assure the squatters that Mr Kimbui was with them. The evidence of this witness is confirmed by what came out during the proceedings in criminal case No. 3617 of 1990 where Mr Kimbui admitted that he had assisted the members of Nabakhwana to incorporate their society and even assisted them to open an account. It is apparent that he changed his mind and wanted to have all the three parcels. Mr Kimbui's action to purchase LR 5335/2 behind the back of the squatters was the height of betrayal of the trust which the squatters had on him.

20. The plaintiff's Advocate relied on the ***case of Gitonga Kimiti & another -Vs- Rose M. Simba & another, Nairobi High Court at Milimani*** in which the Judge in that case quoted a definition of breach

of trust as follows;-

“A breach of trust is essentially a broken trust, a way in which someone fails to fulfill promises connected to something or someone entrusted to him/her. For instance, the trustee of an estate could spend all the money in it or merely fail to do his/her job. Breach of trust may also be used in other contexts, not merely administration of trust funds, to show how a person deliberately or through neglect failed to act in the terms specified in agreements; an accountant who embezzles funds breaks trust with his client”.

21. In the present case Mr Kimbui had promised the squatters that he will assist them get a loan to buy land. The squatters trusted him and opened an account and deposited some money on promise that they were to secure a loan. Mr Kimbui broke that trust when he bought the very land which the squatters wanted to buy and then wrote to the squatters inquiring whether they were still interested in pursuing the loan now that the property had been sold to someone else. Mr Kimbui thought that the squatters will not know that he was connected to the plaintiff company which had bought the property. Mr Kimbui's actions amounted to fraudulent breach of trust and he cannot hide under his company as a corporate entity.

22. On the issue as to whether the defendants have acquired the land by adverse possession, there is evidence on record that before the plaintiff bought the suit lands, the original 54 defendants were employees of Mr Gadher the original owner of the suit lands. The Farmers Co-operative Society who bought the land from Gadher inherited the workers. When the plaintiff bought the suit properties, it did not inherit the former workers. It started demanding that they move out. The defendants were on the suit lands as licencees having been permitted to remain on the land as workers. A licencee cannot acquire title by adverse possession.

23. When the plaintiff bought the suit lands, it brought a private prosecution against the 54 original defendants in 1986. This was about two years after it bought the suit lands. The defendants could not therefore claim to have acquired title by adverse possession either before or after the plaintiff bought the suit lands. The defendants had attempted to lay a claim to the suit lands, by adverse possession through filing HCCC NOS 49, 50 and 51 of 2004. All the three suits were dismissed for want of prosecution. I therefore find that the defendants have not acquired any of the three parcels by way of adverse possession.

24. There was an issue raised by the defendants advocate in his submissions that the plaintiff's suit is not properly in court because there was no resolution by the directors of the company to bring this suit. The advocate cited authorities in support of that point. A look at the defendants defence shows that that point was not raised in their defence. I do not think that a ground which is not raised in the defence can be made a ground at the stage of submissions. Submissions are meant to support points raised in the defence and in evidence. A ground which is not contained in pleadings cannot be raised for the first time in submissions and be allowed. I reject the argument that there was no resolution of the company to bring up this suit.

25. The plaintiff is seeking general damages for non user of its properties since 1986. The plaintiff through Mr Kiamba testified that the properties comprise of 779 acres and that if he were to lease out the land he would have been paid Kshs.5,000/= per acre. He therefore submits that his loss stands at Kshs.108,060,000/=. From the evidence on record LR NO 6416 is 59.94 hectares which translates to 148 acres, LR NO 6485 is 126.76 hectares which translates to 313 acres and 5335/2 is 218 acres. The total acreage of the three parcels therefore comes to 679 acres. When Mr Kiamba was cross-examined by counsel for the defendants, he stated that he cultivates about 300 acres and that the defendants are cultivating about another 300 acres. According to the letter of consent which was granted in respect of LR 6485 and 6416/6, 13 acres were to be reserved for roads. It is therefore clear that the plaintiff's calculation of loss suffered is not accurate. The court has already found that Mr Kimbui's company breached the trust between him and the squatters regarding 218 acres forming LR NO 5335/2. He cannot be allowed to benefit from his own breach of trust against the defendants. It therefore follows that if there is any loss suffered which is due from the plaintiff, it should be in respect of the two parcels which are LR 6485 and 6416/6 which total to 461 acres. If his admission that the squatters are cultivating about

300 acres is anything to go by, then the squatters are utilising 82 more acres above the 218 acres which the plaintiff acquired in breach of trust owed to the defendants. If it were to be assumed that an acre of land could be leased out for a constant sum of Kshs.5,000/= per acre per year, the plaintiffs loss will come to 11,480,000/= being 82 acres x 5,000/= x 28 years = 11,480,000/=. This is not possible because lease per an acre could not be 5,000/= per acre in the 80's. I will calculate the loss based on an average of 1,000/= per acre given the location of the land. The loss will therefore be 82 acres x 1000 x 28 = 2,296,000/=.

26. It is clear from the evidence adduced that the defendants never intended to buy the whole of the Ite Farm comprising of 679 acres. They wanted a portion of it. The plaintiff legally bought the first two portions of the farm that is LR NO 6416/6 and 6485. The defendants have no business staying on the two parcels. There is no dispute that LR 5335/2 is also registered in the name of the plaintiff. If the plaintiff would have been fair, he would have let the defendants buy it. It is never too late. The plaintiff can enter into a mutual agreement to relinquish his right over LR NO 5335/2 to the defendants given the circumstances under which he bought it.

DECISION

27. I make the following orders;-

- i. That the defendants do vacate from LR NO. 6416/6 and LR 6485 within 3 months of the date of this judgement failing which they be evicted from the said parcels without further recourse to the court.**
- ii. That the defendants do pay the plaintiff Kshs.2,296,000/= as general damages for trespass. This sum shall attract interest at court rates from the date of this judgement.**
- iii. That the defendants are allowed to remain on LR 5335/2 pending mutual agreement in terms of the advise of the court contained in paragraph 26 hereinabove. The Plaintiff shall be at liberty to move the court should there be no agreement for appropriate orders.**
- iv. The plaintiff shall have costs of this suit.**

Dated, signed and delivered at Kitale on this 29th day of September, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for Plaintiff and Professor Sifuna for defendants. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

29/9/2014