



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL CASE NO. 15 OF 2002**

**MASAI SAKWA & 40 OTHERS ..... PLAINTIFFS**

**VERSUS**

**ALFRED TUMWET & 2 OTHERS ..... DEFENDANTS**

**JUDGEMENT**

The Plaintiffs brought this suit against the defendants seeking for a permanent injunction restraining the defendants by themselves, their agents and or servants from surveying and sub dividing the suit land according to number of shares held rather than among the original members. The history of this suit can be traced from 1970 when two persons namely Musale Ndiwa and Benjamin Kilwaye leased two parcels of land measuring 678 acres from lands limited, a subsidiary of Agricultural Development Corporation. The lease was for 15 years at an annual rent of 5,460/= with effect from 17th February, 1970. It would appear the two who were tenants in common, incorporated other 39 members and they became 41 in number.

As time went by, the members incorporated a company known as Chemkengen Farming Enterprises Limited (the company) which was duly incorporated on 14/5/1977 under certificate of incorporation number C.15754. It would appear the company was to manage the farm. The company then approached ADC for sale of the farm.

ADC agreed to sell the land at Kshs.201,666/=. ADC through its subsidiary Lands Limited executed a transfer in favour of Musale Ndiwa and partners on 20th May, 1986.

The members of the company were then expected to make a deposit of 20% of the purchase price and pay the balance by yearly instalments of Kshs.18,000/=. It became impossible to raise the 20% deposit from the members. Lands Limited filed a suit against the company vide Nakuru HCCC No. 12 of 1984.

The suit forced members of the company to look for alternative ways of raising the money required by Lands Limited. The company decided to sell 20 acres to raise the 20%. The sale of part of the assets enabled the company to raise 40,000/= which was the 20% deposit required. The members again decided to sell other company assets to raise the balance. A farm house, shop and 10 acres were sold. The sale realized Kshs.366,000/=. This enabled the company to clear the balance owed to Lands Limited.

PW1 Peter Mwangi was one of the directors of the company. He was secretary of the company until 11/5/1986 when he and other officials handed over the running of the company to new officials who had been elected into office on 25/4/1986.

He testified that as at the time he ceased to be a company official, there were original 41 members and an additional 26 others who had been incorporated as members by virtue of buying land from the company.

The total therefore was 67 members.

When the new officials who include the three defendants took office, they proposed that the farm be subdivided in accordance with shares held by each member as opposed to the property being sub-divided equally among the original members. The new officials had presented a list of 138 members who were to be allocated varying sizes of parcels of land. The 138 included the company which was set to get 18 acres, Kimwondo Primary School which was to have 8 acres, cattle dip 1.75 acres, trading centre 2 acres, Chemukengen Primary School 7 acres, and Water Tank 0.5 acres. Apart from the share allocated for public utility plots and the company, there were 65 other members who were set to benefit from the farm but were not members. This is why the plaintiffs moved to court and obtained a temporary injunction restraining the defendants from carrying out subdivision on the basis of 138 members until the suit was heard and determined.

The company had applied and obtained land control board consent to subdivide the farm into 138 plots as per the list presented by the defendants. The defendants through DW1 Johnson Breto Masai contend that there was no agreement to subdivide the land equally according to the original members. He testified that it was not possible to subdivide the land equally among the original members but that the land was to be sub-divided according to what each member had contributed. He contended that the suit land was not entirely bought from the proceeds of the company assets but that there were contributions from members. He denied that the new officials of the company brought in other people who were not members. He contended that once anyone bought land from the company, he/she was brought on board as a member.

The Advocates for the parties herein prepared written submissions and put forth their own issues for determination which may be summarised as follows;-

1. Whether the plaintiff's suit against the defendant is competently before the court.
2. What is the legal effect of failing to enjoin Chemukengen farm Enterprises Limited as a defendant.
3. What is the legal effect of filing suit in the names of deceased persons and further what the legal effect of failing to substitute dead plaintiffs?
4. Was any fraud committed by the defendants upon the plaintiffs?
5. Apart from the money raised through sale of the company assets, was there more money paid to Lands Limited and towards administrative costs?
6. Was the land to be shared out equally among the 41 original members or as per the financial contributions of each member?
7. Did the buyers of the company assets and buyers from the 41 original members become new members of the company and who were to get land allocation as per their payment?
8. Can the prayers sought be granted and with what order on costs?

The suit land comprises of land known as IR 2914 which is 637 acres and IR 6189 which is 41 acres making a total of 678 acres. The suit property is in the name of Musale Ndiwa and partners. The company has never owned the land and if there was any transfer from Musale Ndiwa and partners to the company, then that evidence was not adduced. This is why I said from the beginning of this judgement that the company was incorporated for the sole purpose of managing the suit land. The company therefore has no interest in the suit land. Basically what is before the court is partition of partnership property. This being the case, the suit against the defendants is competently before the court. There was no need for the plaintiffs to sue a managing company which had no interest in the land.

The company did not own any known assets leave alone the suit land. If there is anyone who purported to buy shares from the company, those were paper shares without any value. In any case there was no

evidence that members of the company were allotted shares or that anyone paid for those shares. There were no dividends paid and little if any records were kept. What the company paid to Lands Limited were monies owed to it by Musale Ndiwa and partners to whom its land had been transferred.

There were allegations that some of the plaintiffs died during the pendency of this suit and were not substituted. I am aware that the first, second and thirty eight plaintiffs died and were substituted. If there are any others who died and were not substituted, then by virtue of order 24 rule (2) their suits may have abated and the only recourse by the defendants is to apply for costs incurred in defending the suit. As for plaintiff's whose names were used to file the suit when they had already died, this information should have been brought to the attention of the court for appropriate orders. This was not done and there is no evidence to prove that that was the case. In absence of the evidence of death before institution of the suit, the court can not make a finding or order on the allegation.

There is evidence that after members of Chemkengen failed to raise money for purchase of the suit land, it was agreed that the partnership land be sold to raise the amount. There is evidence that one Andrew C. Ngeywo bought a farm house which included 10 acres at Shs.280,000/=. There is also evidence that Francis Ngugi Gakunga bought 10 acres of the farm. The company also sold two shops. This raised Shs.366,162/=. This amount was besides the amount raised from sale of 20 acres.

The purchasers of the partnership property did not become shareholders of the partnership by virtue of the purchase. Their portions will be taken care of during the partition of the partnership property. It shall not form part of the partnership property. As for those who bought land from individual partners, their entitlement would have to be reduced to reflect the sold portions. Land allocated for public utilities should also be taken into consideration when arriving at the land to be given to each of the original 41 members.

In trying to present more members than the original members, the defendants were intent on defrauding the original shareholders. For instance the second defendant Francis Ngugi Gakunga had purchased 10 acres but in the list forwarded to the land control board, he is supposed to get 19.25 acres and another 0.1 acres. He was never an original member. What he can only get is what he bought from the partnership which enabled the partners to raise the amount paid for purchase of the farm.

In the case of **Mbothu & 8 others -Vs- Waitimu & 11 others 1986 KLR 171**, some 10 partners bought a 442 acre farm. They incorporated a Limited liability company to manage the farm. The directors of the company some of whom were among the 10 original, partners sold out shares to outsiders who now claimed to own the land. The 10 partners brought a suit against the outsiders and the outsiders also filed a suit against the 10 partners. The two suits were consolidated. At the conclusion of the case, the High Court found in favour of the 10 partners and dismissed the outsider's suit holding that the company in which they had bought shares had no legal interest registered or unregistered in the suit land either as owner or lessee. It was held that the 10 original purchasers were therefore tenants in common of the land in equal shares as they were the persons whose names appeared in the register.

Following the decision of the court of appeal hereinabove, I find that the suit land should be shared equally among the 41 original members. This is after the interest of the purchasers who provided money for the purchase of the land is taken into account including all public utility facilities such as roads, schools, market centres, dips etc. I find that the plaintiff's have proved their case against the defendants. The defendants are hereby barred by way of permanent injunction from subdividing the land based on the list containing 138 members including public facilities.

I am aware that this order may cause a bit of discomfort given the period between the filing of the suit and this decision. A lot has happened but justice can only be done if all that is possible is done to process titles for those entitled to the land. I believe this is possible if all parties are transparent. I do not think that this is a proper case where I can make an order for costs. Each party to bear their own costs.

Dated, signed and delivered at Kitale on this 18th day of December, 2013.

**E. OBAGA,**

**JUDGE**

In the presence of Mr Chebii for Mr Kiplenge for plaintiff and Mr Kiarie for defendants. Court Clerk – Kassachoon.

**E. OBAGA,**

**JUDGE**

**18/12/2013**