



**REPUBLIC OF KENYA**

**ALFRED SAGEO OMWERI ..... PLAINTIFF**

**VERSUS**

**TRUPHENA OBONYO MOGENI ..... DEFENDANT**

**JUDGMENT:**

The plaintiff's prayer is for an order of eviction to issue against the defendant from plot No.12 Ekerubo Settlement Scheme and mense profits. He also prays for costs and interest.

The plaintiff (PW1) told court that he bought one share in Ekerubo Farmers

Co-operative Society. The society had in 1967 bought a piece of land to be shared among its 100 members. The members settled in the land in 1968. In 1990 the plaintiff said, he gave the defendant one acre of his land to cultivate on humanitarian grounds after she had been chased away by her relatives. In 1995 he asked her to leave his land but she caused him to be arrested. She and her children built 16 houses in the land. She later filed a case claiming 23 acres of his land but later withdrew it. He said that he paid for the share of land alone. Eventually each of the original 100 members were allocated with 46 acres per share. He denied ever inviting the defendant to join him as a shadow partner and help him pay for the land.

The defendant filed a defence denying the plaintiff's claim. She also put in a counterclaim claiming 23 acres being half share of the land. She gave evidence and said that the plaintiff in 1975 invited her to join him in paying for his share to the society. They agreed that she will be his partner and a "shadow member" of the society. She agreed and joined him. Payment to the society was to be made in the name of the plaintiff who was the member in the records of the society. Price of each share was shs.12,000/- and as such each was to pay shs.6000/-. Members also contributed labour to the society by harvesting society's pyrethrum as part of payment. She said she paid shs.3000/- to the plaintiff and also participated in harvesting pyrethrum. The plaintiff introduced her to the society's committee as his partner in holding his one share. They entered into an agreement which was written by ONYANCHA JOHN SEME (DW2). Though neither the plaintiff or defendant signed the agreement the committee members signed as witnesses. By then she had already given the plaintiff sh.3000/- to pay to the society. The balance of shs.3000/- was to be paid to him in two equal instalments of shs.1500/- which she later paid. She further said that she also paid further monies to the society direct but the receipts were issued in the name of the plaintiff who was the registered member. She produced a bundle of 12 receipts all totaling to sh.5,300/-. Defendant said that since 1975 they have been living in the plot now No.12 together with the plaintiff. Initially it was not known by the society the acreage for each share. They were originally given 10 acres and each was occupying 5 acres. Later in 1990 it was decided that each share will be allocated 46 acres. The plaintiff was therefore allocated 46 acres for his one share. She said she was entitled to half of that land which the plaintiff holds in trust for her.

Plaintiff called the maker of their agreement – John Seme (DW2) who confirmed writing the agreement. He was then a teacher. He wrote as the parties told him. The committee members signed as witnesses. He also signed.

The 3<sup>rd</sup> defence witness one CLEMENT ONDIEK MISAIRO (DW3) said he is the current chairman of

the society. Between 1982 and 1984 he was the society's chairman. He had been a committee member of the society all along. He said the plaintiff was one of the original 100 members of the society. He said the plaintiff introduced the defendant to the committee as his partner in respect of his one share.

ALISTALICO NYATONGO (PW4) told court that he was a member of the society. He also was the chief headman of the society. Plaintiff was a watchman and worked under him. He said he witnessed the agreement between the plaintiff and the defendant. He signed it. Plaintiff said the defendant was his partner and he had already paid him shs.3000/-.

There is no dispute that the plaintiff was a member of Ekerubo Farmers Co-operative Society. He was one of the original 100 members. The defendant confirmed this and so did her three other witnesses. He had one share in the society. Infact since the filing of the case and after he testified he was issued with a title deed for parcel No. Ekerubo Settlement Scheme/12 measuring 18.5 hectares of 46 acres. Thus the land in dispute is now in his name. However the issue is whether they had bought the land jointly and with the defendant meaning that he holds half of that land in trust for the defendant. He denied ever inviting the defendant to join him as his partner and that he had only given her one acre.

However the evidence of the defendant was very forceful and proves otherwise. First the explanation by the plaintiff that he had given her one acre on humanitarian grounds sounds hollow. He had denied that they had no relation though the defendant said the plaintiff's mother in-law is from her area.

DW2, 3 and 4 all testified that the plaintiff introduced the defendant to the society as his partner. It seems that the society was not ready to register more than 100 members. Those members who were unable to pay for their share were allowed to team up with another person but all the payment were to be made in the name of the original member. The society was then to give land to the original member who would in turn share it with his partner or what was called "shadow member". The evidence on record shows that what happened. The plaintiff invited the defendant to join him as a co-share holder and they paid for the one share. This was in 1975. DW2 said to court that by then the land had not been sub-divided and allocated to members. They were still paying for their shares. The members had been allocated 10 acres on interim basis. It was in 1991 when the land was sub-divided and allocation made. I find no reason why DW2, 3 & 4 would have given fabricated evidence in favour of the defendant. DW2 was a committee member and nor the vice chairman of the society. He testified that plaintiff introduced the defendant to the committee as his partner and said she had already paid shs.3000/-. DW4 confirmed this and said he signed the agreement which was drafted by PW2. I am satisfied this was so. The defendant has even contrasted a total of 16 houses in the land. One cannot do this on someone's land as the owner watched passively. The two had an agreement, and on understanding about sharing the land. Allocation and registration took long.

There was the issue of the validity of the agreement written by DW2. True the two parties did not sign and some parts are a bit ambiguous. However DW2 told court he wrote down what the two told him to write.

It is clear that they were getting into an agreement and the mixture of the party who was to pay does not cloud their intention. Also the failure to sign by the two parties does not make it invalid.

DW2 explained that as a layman he did not know that the two should sign. However there are witnesses who signed. The court of appeal in the case of Wagiciego -vs- Gerrald (1982) KLR 336 cited by counsel for defendant clearly addressed the issue of parties not signing an agreement. Court held such an agreement not signed by parties can constitute a valid agreement. The intention of the parties in the agreement was clear.

There were witnesses to the agreement. I am satisfied it was a valid agreement and therefore satisfies provisions of s. 3(3) of Law of Contract Act.

Also there was an issue raised that no consent of Land Control Board was obtained within 6 months of the agreement as the land was agricultural land. True no consent was obtained. However the agreement

was not for sale of land per se. The defendant was buying ½ share of the share the plaintiff held with Ekerubo Farmers Co-operative Society. At the time of the agreement land had not been allocated or registered. Infact members did not even know the acreage they were to get. As such I find that the parties were not obliged to comply with provisions of s. 6(1) of the Land Control Act.

The defendant in his counter claim prays for transfer of 23 acres of land by the plaintiff which was half of his share. However in her evidence she said she wanted 22 acres and the plaintiff be left with 24 acres. She did not explain her shift of position. However I believe that she released that though the agreement was for each to get ½ share of the land the plaintiff seemed to have paid and done more and was therefore entitled to a bigger share than the defendant.

In his evidence he said he paid shs.6,300/- and later shs.9,600/-. He produced bundle of receipts to show this. He later paid shs. 19,334/50 to an advocate as legal fee to process title. The defendant did not say if she participated in payment of legal fees.

She initially paid shs.3000/- to the plaintiff. She also paid shs.5,300/- directly to the society on top of the shs.6000/- she paid. It is therefore clear that they cannot share the land equally. Plaintiff paid much more than the defendant. I make a finding that the defendant is entitled to only  $\frac{1}{3}$  of the land and not half as she prays. She should not get more than what she paid for. The plaintiff has even processed and got the title to the land.

The upshot of the above is that I find that the plaintiff has failed to prove his claim against the defendant and I therefore dismiss his suit. I find that defendant has partially proved her counter claim and enter judgment in her favour and order the plaintiff to transfer fifteen (15) acres – which is a third of 46 acres from land No. Ekerubo Settlement Scheme/12. Since the defendant's counter claim has succeeded only partially she will get half of costs of the suit.

**Dated 25<sup>th</sup> January 2006.**

**KABURU BAUNI**

**JUDGE**

Cc – Mobisa

Mr. Soire for the defendant

N/A for plaintiff.

**KABURU BAUNI**

**JUDGE.**