



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 176 of 2000

NORTH KISII CENTRAL FARMERS CO. PLAINTIFF

VERSUS

JEREMIAH MAYAKA & 4 OTHERS DEFENDANTS

JUDGMENT

The North Kisii Central Farmers Limited was incorporated as a Public Limited Liability Company on 23/4/1977. One of its objects was to purchase and develop land.

In the late 1970's, the directors of the company identified three parcels of land in Kitale, which they intended to acquire from one Thomas William Dale. The parcels which were registered as L.R. Nos. 2170, 3160 and 6150 comprised of 3,266 acres in total, were to be sold as a going concern on a walk in walk out basis.

It would appear that though the company had raised money through member's contributions it however could not raise the full price or pay the sum in foreign currency as required by Dale. It therefore approached the Settlement Fund Trustee ('SFT'), for a loan facility, which was readily granted and SFT was able to meet the said requirements. There is evidence on record that SFT paid Dale the sum of K. Shs. 2,634,120/-, against a valuation report carried out over the aforementioned land and movable assets.

The company, which had already sent a group of its 500 members to Kitale ahead of the others, took possession of the farms on 15/1/1979, and settled the 500 members, while the other members stayed back in Kisii awaiting settlement.

It would appear that matters became so complicated for the company, as more members wanted to be settled on the newly acquired land. It became a security issue and the Local District Officer attended the Company's Annual General Meeting of 20/12/1981, at which meeting members who had not yet been settled enquired about the fate of their contributions. The District Officer gave the directors two months within which to account for the contributions, which they did not, and he therefore appointed a care-taker committee from members of the company to look into the said issue. The said committee which included Jeremiah Mayaka Ombui, and four others would remain in office for three months after which the company's shareholders would elect new office bearers.

In the meantime and unknown to the company, the Government had in 1980 decided to acquire L.R. No 3160 comprising of approximately 1000 acres for the settlement of ex-labourers and squatters.

Being aggrieved by that decision, the company decided to take legal action against the Attorney General ('AG'), and it thus instituted its suit, on 25/1/1984, being HCCC (Kisii) 6 of 1984. Its prayer against the

AG was for an order to compel him to deliver the said 1000 acres of land to them. It based its claim on the ground that though it had negotiated for the purchase of the three aforementioned parcels of land, the local District Commissioner and the SFT had acquired a portion of 1000 acres, which they proceeded to allocate to persons, who were not its members. It therefore felt that it had been thus been deprived of the use of the said land.

The suit was thereafter transferred to this Court and issued with a new number, namely H.C.C.C. (Eld.) No. 132 of 1987. This court awarded it with inter alia, the sum of K.Shs 441,350/=. The court also ordered on 19/2/1992, that the said sum be paid to the shareholders who had not been allocated with land in Kitale.

I shall, at the request of both parties hereto, make reference to that file and all the exhibits that were produced therein, with a view to resolving this longstanding matter. I shall refer to that matter as 'the matter with the AG'.

Coming back to this particular case, it would appear that the company was still not satisfied, as most of its shareholders were never settled on the subject land. It tends to blame the five members of the care taker committee, against who it instituted this suit in the year 2000. It alleges that the five, who have been masquerading as its officials, have been collecting money illegally from its shareholders and have greatly hampered its operations, and further that they acted fraudulently. It therefore seeks judgment against them jointly and severally, a permanent injunction to restrain them from running its affairs, as well as general damages and costs.

The five defendants who deny each and every allegation aver that it is SFT, and not the company, which owns the land in issue.

According to Jairus Achoki Nyambani (PW1) who was the first elected Chairman of the company, and who still appears to be the same the members initially contributed some money of which K. Shs. 2,000,000/= was paid to Dale as part of the purchase price. It was also his evidence that thereafter, it was agreed amongst the 2,229 shareholders that *"500 people would take possession and that after redeeming the SFT loan, the land would be subdivided amongst the 2,229 members, after which, the 500 were settled and are still in occupation"*. He acknowledged the fact that those in possession were repaying the SFT loan, which has yet to be redeemed in full.

Based on the evidence on record I am convinced that the defendants were, and are still recognized as shareholders of the company. Indeed their names or those of their late spouses as the case may be appear in the list of original shareholders, which was produced by the company as its exhibit 3.

I have considered the evidence on record, especially that of Thomas Morara Nyangau a Legal officer with the Land adjudication & Settlement (DW2), and Joan Everi, the District Land Adjudication & Settlement Officer in Kitale (DW3). I find that there is sufficient proof that the land in question actually belongs to SFT, which, it has been shown paid the full purchase price directly to Dale, and to who Dale transferred the said three parcels on 26/2/1979. Indeed the entries of transfer on the three Titles are clearly shown as Nos. IR 533/13, 1859/22 and 185/36. They are all in favour of SFT. It has been shown satisfactorily that SFT in turn advanced a loan to the company for the purchase of the subject farms and movables. It has likewise been shown, and based on the evidence of DW 2 and 3, that the said proprietorship will remain unaffected until the loan to the company is redeemed in full.

In an effort to disprove the claim against them, the defendants have also adduced sufficient evidence, to show that though the company settled its members, it was SFT, which oversaw the exercise and ensured that each shareholder was allotted with a parcel commensurate with his shareholding. They have also been able to show that it was SFT, which planned the actual settlement, following a plea by the allottees to withhold foreclosure. This line of evidence was corroborated by DW3.

But the company also prays for compensation for movables, which it alleges that the defendants wasted.

Having alleged it, it was for the company to prove that the movables were in existence at the time when these defendants were appointed, and further that the assets had actually been handed over to the defendants. According to Jeremiah Mayaka Ombui (DW1), there were no movables on the farms at the time when his committee took over the management. It was thus imperative for the company to furnish or provide a comprehensive list or inventory of the said assets, but it did not. Lack of such crucial evidence would only mean that though the company did acquire movables at the time of the subject purchase, it is however doubtful whether there was proper hand over at the time when it took initial possession, and also when the care taker committee took over. Such doubts tend to benefit the defendants.

The defendants would also tend support the contention by PW1, that those who were settled on the land were apportioned with the SFT loan. I am also convinced that each allottee has been repaying the SFT loan in an individual capacity, a fact that was corroborated by the local SFT officer (DW 3). It is also clear that the individual farms so allocated are being managed as individual units by each allottee. In my humble opinion, the company cannot be heard to allege that the defendants are mismanaging its assets, for it had none to call its own at the material time, neither has it shown that it owns any now.

Based on the above and on the other evidence on record I am not convinced that the defendants have been collecting money from shareholders as alleged by the plaintiff.

Be that as it may, the exhibits which the company produced and especially the Annual General Meeting Minutes of 21/2/82, 29/1/1993 and 12/6/1999 all tend to show that PW1 was the Chairman at all times, in which case, the company would be hard pressed to show or prove in any way that the defendants have taken over the management of the company. In any event, most of those who are in occupation of the subject farms attended the meetings, at which venue the loans by SFT were discussed and members notified of the fact that the loan was being paid by the allottees. They were also informed that a sum of K. Shs. 2,408,871.95 had been paid by June 1999, leaving a balance of K. Shs. 2,000,000/- at a daily interest rate of 954/50. Having noted that the issues were discussed at the said meetings one can safely assume, that the issue of the allocations of the subject land, and the loan repayments were not a secret at all.

The upshot of all this is that the company has failed to prove its case against each of the five defendants on a balance of probability and I do dismiss its case against the five with costs.

However I feel that though I have found as above, there are a few issues, which can not be left unresolved, for it cannot escape ones attention that the whole issue in this case revolves around company assets, more so land. It is on record that the directors of the company, who had been originally elected in office, did not comply with the order of the District Officer to furnish accounts within two months. It is also on record that these defendants were appointed with a view to quelling tension amongst members of the company who wanted to know about the fate of their contributions, and hence allocations of land.

The company claims to have paid Dale the sum of K.Shs 2,000,000.00, and to this effect PW1 produced an agreement, which the company allegedly entered with Dale on 4/11/1978 for the purchase of the three subject properties. I have perused the same and of interest is the fact that only three months thereafter Dale transferred the subject parcels of land to the SFT, without any mention of the agreement with the company. Of more interest is the fact the issue of that particular payment must have been considered by the learned trial Judge in the matter with the AG, for among the exhibits, were a letter by Kaplan and Stratton Advocates which firm was acting for Dale at the material time, in which the said firm categorically stated that Dale was never paid that money. Of equal interest is the fact that SFT, which claims to have acquired the land directly from Dale, never mentioned that payment in any of their letters on the subject. Faced with that type of denial, it was incumbent upon the company to furnish this court with relevant and sufficient proof, but it did not, unfortunately to its detriment. The only logical conclusion would only be that the agreement with Dale aborted. This would be explained by the fact, which the company concedes to, that it was unable pay the full purchase price or even remit the sum in foreign currency as required by Dale. In the circumstances, I find that there is no evidence that the company did remit any money to Dale as alleged. Further, the valuation which was availed to SFT in support of the offer for sale by Dale, which also forms part of the record in the matter with the AG, reveals that while the land was valued at K.Shs. 1,766,100/=, the movables were valued at K.Shs

868,020/=. The combined figure appears in SFT's payment voucher in favour of Dale, as well as in the Transfer document, and which tends to give credence to DW2's evidence, which was to the effect that the total purchase price was K.Shs. 2,634,120/=.

One may as well enquire what I am driving at.

This matter which revolves around land, involves over two thousand members. It cannot be gainsaid that each must have had very high hopes of settlement when he set out to contribute for a share in the company. Not all were lucky. The company has lost this case, but it owes a duty, especially that of accounting to its shareholders. I have already touched on the 1992 award of K.Shs.441,350/=, which was meant to compensate all the shareholders who were not allocated with land.

Though I find that there is no proof that the company paid the sum of K.Shs.2,000,000/= to Dale, it has however been able to prove, on a balance of probability, that it paid SFT the sum of K. Shs.300,000/-, which was the initial deposit.

In my very humble opinion, it is important that justice be done, and that this matter be settled in the most amicable manner. It is obvious that those who are currently settled on the land would not have enjoyed the benefit were it not for the benevolence of the other members who were not so lucky. Those who are settled cannot have their cake and eat it, for that would not be fair or just.

In the interest of justice, I do order the defendants and all the members who are currently settled on the subject land, to pay back the sum of K. Shs. 300,000/-, (the initial deposit to SFT). The sum which must be paid within the next six months, shall accrue interest at court rates from 5/11/1979 (when the payment was made to SFT), till payment in full. The five defendants shall oversee the collection of the said sum whose payment will be apportioned on a pro rata basis depending on acreage of each allottee.

I do also order the company to account to all its members for the aforementioned sum K.Shs 2,000,000/=-, which it did not pay to Dale.

Each party shall be at liberty to apply.

Those shall be the orders of this court.

Dated and delivered at Eldoret this 22nd day of February 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Omboto holding brief for Mr. Khaosa for the defendants

Mr. Onyinkwa holding brief for Mr. Orina for the plaintiff