



**Abok v National Social Security Fund (NSSF) & 2 others (Environment & Land Case E074 of 2021) [2022] KEELC 14775 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14775 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E074 OF 2021  
EK WABWOTO, J  
NOVEMBER 10, 2022**

**BETWEEN**

**HUMPHREY WENDE ABOK ..... PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND (N.S.S.F) ..... 1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit relates to a dispute of ownership plot No B2/1 also known as Tassia LR 97/1155/002/1 pitting the Plaintiff and the defendants. The Plaintiff instituted this suit vide a plaint dated February 24, 2021 seeking for the following orders.
  - a. A declaration that the Plaintiffs are the registered ownership and/or proprietors for the suit premises known as Plot No B2/1 from Kwadenga Self Help Group which later turned out to be registered under the Defendant's name known as Tassia LR 97/1155/002/1
  - b. A permanent injunction restraining the Respondents by themselves, their servant, or any other person claiming title through the Defendants, be restrained from trespassing on, constructing on, transferring, disposing of, alienating, wasting, or in any manner interfering with the known as Plot No B2/1 from Kwadenga Self Help Group which later turned out to be registered under the Defendant's name known as Tassia LR 97/1155/002/1 pending the hearing and final determination of this suit.
  - c. A cancellation of the title document purportedly issued on February 6, 2006 to date.
  - d. Eviction of the Defendants from the suit property.



- e. An order directed to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to facilitate registration of known as Plot No B2/1 from Kwadenga Self Help Group which later turned out to be registered under the Defendant's name known as Tassia LR 97/1155/002/1 in the name of the Plaintiff.
  - f. Mesne profits.
  - g. Costs of this suit.
  - h. Any other relief that honourable court may deem just to grant.
2. The suit was opposed by the 1<sup>st</sup> Defendant who filed a defence dated June 9, 2021. No response was filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

**The Plaintiff's case.**

3. The Plaintiff's case is contained in his plaint dated February 24, 2021, together with his witness statement sworn on February 24, 2021 and list and bundle of documents dated February 24, 2021 and a further list of documents dated October 4, 2021.
4. It was the Plaintiff's case that he entered into a tenant purchase agreement with the 1<sup>st</sup> Defendant for a consideration of Kshs 550,000/-. It was also pleaded that the 1<sup>st</sup> Defendant entered into a sale agreement with a 3<sup>rd</sup> party who has since erected a perimeter wall without the Plaintiffs knowledge and/or consent. The Plaintiff further pleaded that he has made various attempts to resolve the issue but the same has been unsuccessful.
5. During the hearing of the case, the Plaintiff adopted his witness statement and bundle of documents filed herein as part of his evidence in chief. He testified that he purchased the suit property from Kwa Ndege Self Help Group and the 1<sup>st</sup> Defendant had agreed that they open new account and register with NSSF and pay market rates for the plot.
6. It was the Plaintiffs further testimony that the 1<sup>st</sup> Defendant gave him a personal account No xxxx for the purposes of remitting payment. It was also stated that he was given a notice of default in payment which was recovered to pay Kshs 124,000/- and he subsequently made payment on 11<sup>th</sup> December, December 30, 2008 and January 15, 2009. He further stated that he did not receive the tenant purchase agreement and hence therefore he did not receive the tenant purchase agreement and hence therefore he did not pay Kshs 10,000/-. It was also his testimony that he was in actual occupation of the suit property. The Plaintiff concluded his evidence in chief by stating that he was verbally instructed by the 1<sup>st</sup> Defendant to stop making payments.
7. Upon cross-examination, he stated that he did not have the tenant purchase agreement of the property since he was not given any. He also conceded that Kwa Ndege was not the owner of the property. On further cross-examination, he also stated that he did not sign any tenant purchase agreement with the 1<sup>st</sup> Defendant. He also stated that he made payment of Kshs 263,000/- to 1<sup>st</sup> Defendant. He also conceded that he does not have any certificate of title in respect to the property.
8. On re-examination, he stated that he was given account number xxxx in his name which he was supposed to make payments. On further re-examination, he stated that he had no details of the third party who had faced off his property. He also clarified that his claim seeks for cancellation of the agreement between NSSF and the third party and that he had not received any letter from the 1<sup>st</sup> Defendant cancelling or rescinding the agreement. He also reiterated that he was never informed that the plot had been sold to a third party.



### **The 1st Defendant's case.**

9. The 1<sup>st</sup> Defendant filed a defence dated June 9, 2021. The 1<sup>st</sup> Defendant also filed a witness statement sworn by Tobias Ombado on February 10, 2022.
10. The 1<sup>st</sup> Defendant averred that Kwa Ndege Self Help Group had no legal interest in the property since the group had grabbed their property and allocated it to its members which action was illegal.
11. It was also averred that, the 1<sup>st</sup> Defendant allocated the Plaintiff Plot Number Tassia LR 97/1155/002/1 on March 27, 2003 at a consideration of Kshs 586,590.00 which he paid only Kshs 263,000/- and defaulted.
12. It was also the 1<sup>st</sup> Defendant's case that on default, the Plaintiff was not given possession by the 1<sup>st</sup> Defendant and no agreement was entered into. On December 1, 2008, the 1<sup>st</sup> Defendant gave the Plaintiff a notice of default requiring him to collect and sign tenant purchase agreement within 30 days failure to which the property will be repossessed. The notice was not complied with and the property was sold to another willing buyer.
13. Tobias Ombado a loans officer testified on behalf of the 1<sup>st</sup> Defendant. He adopted his witness statement sworn on February 10, 2022 as part of his evidence in chief.
14. On cross-examination, he stated that the Plaintiff's account was not active and neither was he sure whether the default notice had been received by the Plaintiff. He also stated that the details of the third part was in the file which information he had not brought to this court. He also stated that the Plaintiff was issued with a receipt in respect to the payments made by him.
15. On re-examination, he stated that the Plaintiff was never given a tenant purchase agreement because he never paid the sum of Kshs 10,000/- which was required before collecting the said agreement.

### **The Plaintiff's submissions.**

16. The Plaintiff filed his written submissions dated July 29, 2022 through the firm of Otieno Arum & Co Advocates. Counsel submitted on two issues which he urged the court to consider: -
  - i. Whether the Plaintiff has made a prima facie case.
  - ii. Whether the Plaintiff is the legal owner of the suit property.
17. Counsel submitted that the Plaintiff had testified buying the suit property from Kwa Ndege Self Help Group before the same reverted to the 1<sup>st</sup> Defendant.
18. It was also submitted that he paid the sum of kshs 10,000/- which was required before issuance of the agreement. The same was paid on December 11, 2008 and the Plaintiff was issued with receipt No T010041226 on account No xxxx.
19. Counsel also submitted that on December 1, 2008, the 1<sup>st</sup> Defendant issued default notice of Kshs 124,000/- which was placed under the funds tenant purchase scheme. The Plaintiff was advised to collect the Tenant Purchase Scheme agreement within 30 days upon which he visited the 1<sup>st</sup> Defendant's offices in vain but the same was not given to him.
20. Counsel submitted that where land has been allocated and the allottee has complied with the conditions therein then the same cannot be available for re-allocation to another person. Counsel also made reference to the case of Giella –Vs- Cassman Brown (1973) EA 358 and prayed for injunction orders against the Defendants.



### **The submissions for the 1<sup>st</sup> Defendant.**

21. The 1<sup>st</sup> Defendant filed its submissions dated September 5, 2022. Counsel submitted on the following singular issue, Whether the Plaintiff is entitled to the reliefs sought.
22. It was submitted that the Plaintiff's suit is predicated upon a tenant purchase scheme allegedly entered between the Plaintiff and the 1<sup>st</sup> Defendant yet the same was never produced in court. Counsel submitted that in the absence of the agreement, the Plaintiff's claim cannot stand in light of section 3(3) of the Law of Contract Act as read with Section 38 of the Land Act. The said provision states as follows: -

' No suit shall be brought upon a contract for the disposition of an interest in land unless: -

- a. The contract upon which the suit is filed
  - i. Is in writing
  - ii. Is signed by all the parties theretoand
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.'

Reliance was made to the cases of Leo Investment Ltd- Vs- Estuarine Estate Ltd (2017) eKLR, Patrick Tarzan Matu & Another – Vrs- Nassim Shariff Abdulla & 2 others (2009), Silverbird Kenya Limited –Vs- Junction Ltd & 30 others (2013) eKLR and Daudi Ledama Morintat –Vs- Mary Christine Karie & 2 others (2017) eKLR

23. It was also submitted that the Plaintiff is seeking for adverse orders against a third party who is not a party to the suit. Counsel argued that the same would be an affront to the basic tenants of the rules of natural justice and reliance was made to the case of Peter Kinyua Kimemia & 3 others –Vs- Embakasi North Constituency Development Fund Account Manager & 2 others (2021) eKLR.
24. It was also argued that no fraud was proved during the hearing. Counsel however admitted in the 1<sup>st</sup> Defendants submissions that indeed the Plaintiff had paid a sum of Kshs 263,000/- but defaulted since he did not pay the entire purchase price which default prompted the 1<sup>st</sup> Defendant to issue notice to repossess the property and subsequently sale to another party.
25. Counsel for the 1<sup>st</sup> Defendant concluded her submissions by urging the court to dismiss the suit since the Plaintiff's claim had not been proved on a balance of probability as required.

### **The Submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.**

26. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant despite being served never filed any written submissions and neither did they participate in the proceedings.

### **Analysis and determination.**

27. I have considered the pleadings, the evidence and the submissions made by the Plaintiff and the 1<sup>st</sup> Defendant and the issues arising for determination in the suit are as follows: -
  - i. Whether the Plaintiff has proved his case on a balance of probabilities and if so;



- ii. What are the appropriate reliefs?
28. The Plaintiff pleaded that at all material times he was in possession no the suit property known as Plot No B2/2 from Kwa Ndege Self Help Group which was later registered under the 1<sup>st</sup> Defendant's name as Tassia LR 97/1155/002/1.
29. According to the Plaintiff he had made payments towards purchase of the said property and on default he has never given the tenant purchase agreement but instead the 1<sup>st</sup> Defendant repossessed the same and sold to a third party.
30. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the [Evidence Act](#), which provides as follows:
- ' (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'
31. Section 3(3) of the [Law of Contract Act](#) provides as follows: -
- ' 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) the contract upon which the suit is founded:
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust'
32. The court will be guided by the following. In the present case, the Plaintiff did not produce any tenant purchase scheme the basis upon which he could have demonstrated his ownership to land. The Plaintiff's suit primarily seeks a declaration and ownership in respect to the suit property known as Plot B2/1 now Tassia LR No 97/1155/002/1.
33. Counsel for the Plaintiff submitted that since the Plaintiff's suit sought a declaration as to ownership of property, the Plaintiff ought to have produced the said tenant purchase agreement and Counsel referred to Section 3 as read with Section 38 of the [Law of Contract Act](#).
34. In view of the foregoing, it is the finding of this court that the Plaintiff has not proved his case to the required standard.
35. On whether or not the Plaintiff is entitled to the reliefs sought, the Plaintiff sought for several reliefs which were pleaded. However, during the hearing of the suit, the 1<sup>st</sup> Defendant's witness relying on his witness statement admitted that the Plaintiff paid a sum of Ksh 263,000/- towards the acquisition of the suit property which can be refunded. It's my view that while this specific relief was not pleaded by the Plaintiff, it is an issued which emerged during trial and considering that the same was admitted by



the 1<sup>st</sup> Defendant, I will proceed to grant the same. This Court relies on the well known case of *Odd Jobs vs Mubia (1974) EA 476* where it was stated as follows:

' With respect to the learned Judge, that issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the court for decision – see *Odd Jobs vs Mubia (1974) EA 476*.'

The same issue was also addressed by the Court of Appeal in the case of *Transworld Safaris (K) Limited v Robin Makori Ratemo [2008] eKLR*

36. It was not disputed by the 1<sup>st</sup> Defendant that the Plaintiff had made some payments towards the acquisition of the property. As earlier stated, it was admitted by the 1<sup>st</sup> Defendant that a sum of Kshs 263,000/- had been paid by the Plaintiff. In view of the foregoing, I will direct that the same be refunded to the Plaintiff. However, had the Plaintiff specifically pleaded for the same, I would have further directed that it be refunded with interests at court rates.
37. On the issue of costs, the same is a discretion of the court and considering the circumstances of the instant case, I will direct each party to bear own cost of the suit.

#### **Final orders**

38. In conclusion, I make the following final orders in disposing the Plaintiff's suit herein.
- a. The Plaintiff is entitled to a refund of Kshs 263,000/-
  - b. The reliefs not expressly granted are declined.
  - c. Each party to bear own costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 10<sup>TH</sup> NOVEMBER, 2022.**

**E.K. WABWOTO**

**JUDGE**

In the presence of:

Mr. Arum for the Plaintiff.

N/A for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

Court Assistant: Caroline Nafuna.

**E.K. WABWOTO**

**JUDGE**

