



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Case 10 of 1996**

**JOHN ONYANCHA ZURWE..... PLAINTIFF**

**VERSUS**

**ORETI ATINRA ALIAS OLETTI ARHINRA..... DEFENDANT**

**JUDGMENT**

The plaintiff's claim in this suit against the defendant is for a declaration that the plaintiff and the defendant are equal partners in the purchase of one share in Ekerubo

Farmers Co-operative Society and for that reason he is asking for a further declaration that he is entitled to 23.5 acres being a half share of plot No. Ekerubo/54 in Ekerubo Farmers Co-operative Society Farm. He is also asking for costs and any other orders the court may deem fit to grant.

In his testimony in this court the plaintiff JOHN ONYANCHA SURE PW1 said that on the 17<sup>th</sup> day of March 1978 the defendant herein ORETI ATINDA alias OLETHI ADHINDA approached him for the purposes getting some money from him (the plaintiff) so that he could use the same for repaying Loans due to a Co-operative Society the defendant had purchased shares from. The consideration on this request would be that the plaintiff and the defendant would be joint owners of the share.

Both parties then called some members of the Society and it was then agreed that the plaintiff should pay the sum of shs. 18000/= to the defendant and then they would both continue repaying the loan to the Society.

The Society where the shares were is called Ekerubo Farmers Co-operative Society Limited and those called to witness the transaction were the Society Chairman called Nahason Tinega, the others were Misati Orucho, Zagero, Omweri and the son of the defendant called Atinda Oreti.

On this sitting the plaintiff says he paid the sum of shs.7, 500/45 to the plaintiff, then on 23.3.1978 they proceeded to the office of D. A. Onyancha & Co Advocates where he paid a further sum of shs.2, 449/55 to make a total down payment of shs. 10,000/=.

An agreement was then drawn in the offices of the said firm of Advocates showing the amount which had been paid upto that time and that the balance would be paid by the plaintiff to defendant by quarterly installments of shs. 1200/= to make a total of shs. 18,000/=. He produced a photocopy of the agreement as exhibit PI.

PW1 further stated that at the time the agreement was entered the defendant had only ten (10) acres of land which they shared equally. The balance of the land was still in the use of the Society.

It is his contention that each shareholder in the Society has forty six (46) acres of land. That to date the share he has an interest in is still registered in the name of the defendant.

According to him the Society's Loan was repaid in full in the year 1989 and the Society gave each individual shareholder his portion in the year 1990 and he knows the defendant was given Forty seven (47) acres of land, and when he went to the defendant in the year 1990 to get his portion, he was not given his full entitlement.

It is further his testimony that he made payments of sh.2,300, shs.4,050 and shs.3,400/=. He was not able to produce receipts to back up this payments.

As far as is concerned the land was not sold to him but he became a co-partner in the shamba with the defendant when he paid the initial amounts and the other sums to safeguard the shares.

He knows that there was a suit between the defendant and his cousin called Matara whom he had invited into the same land and as the defendant did not want him, sued him for eviction.

For these reasons he wants to be given his share of 23 1/2 acres in plot number 54.

When he was cross examined by Mr. Onyinkwa, the plaintiff stated that he was not member of Ekerubo Cooperative Society Ltd but agrees that it is the defendant who is a member.

He said further in cross-examination that when he entered into the agreement on 23.3.1978 the buyers were him and his cousin Matara Onyancha. He admitted that the agreement shows the land in question was ten (10) acres and he and the defendant were to get five (5) acres a piece.

He acknowledged that the agreement also stated that the terms therein were not to be changed without the consent of either party.

He also admitted that there is nothing in the agreement showing that the loan repayment was to be done jointly by the defendant and the plaintiff.

He further admitted that there is nothing in the agreement showing he is entitled to 237, acres of land.

As for Matara Onyancha he said he brought him in to the land, but he doesn't he was sued for eviction and he doesn't know if he was to be evicted apart from the five acres area sold to the plaintiff.

He admitted further that Matara Onyancha's entitlement is on the land the plaintiff has.

PW2 FRANCIS OGETO MIRIGI who lives in Ekerubo Ranch Scheme is a neighbour to both parties herein and his plot Number is No.53. He states both parties live on Plot No. 54.

He remembers that on 18.3.1978 the plaintiff herein approached him to be a witness to the venture he was entering into as he was entering into a partnership agreement with the defendant. Misati Orucho, Nyabando Orucho and others he has forgotten, proceeded to Esise Primary School where the deal was struck and it was agreed that for the plaintiff to be a co-owner of a share with the Defendant he was to pay to the defendant the sum of shs. 18000/=.

The sum of shs.7500/45 was paid on that day in his presence.

As he is also a shadow member in the society, he knows that at that time only Ten

(10) acres had been given to each member. He knows that the loan has since been repaid and the land distributed to the share-holders

On being cross-examined by Mr. Onyinkwa he said that at the time the plaintiff was invited to join in the ownership of the share only ten acres of land were available to each member.

He further admitted that in the agreement the plaintiff and the defendant agreed to share the said ten acres of land.

PW3 NAHASHON TINEGA testified and said he knows both parties in this suit both of them had purchased land jointly at Ekerubo Farmers Co-operative

Society Limited. That he is a member of the said Society and had been its Chairman from 1973 to 1978 and currently he is the Secretary of the Society.

He remembers that sometimes in the year 1978, when the defendant had difficulties in loan repayment he went to him (PW3) and told him that he had gotten somebody to assist him in having the loan repaid. That the defendant wanted PW3 to accompany him and witness the plaintiff give him (the defendant) the said money.

As the parties had agreed on the sum of shs. 18,000/=, PW3 said he witnessed the sum of shs.7000/= being paid out.

Later they all went to D. A. Onyancha and Company Advocate's office where the agreement was drawn and as the amount which had been paid was not complete it was agreed that the balance be paid by installments.

It is further his evidence that as the amount was not enough to clear the loan, the parties, both of them will pay off the loan equally and thereafter they would be entitled to 46 acres equally.

It is his evidence that at the time the agreement was made the defendant had not been allocated the entire 46 acres of land but only 10 acres. The remaining 36 acres came out after the loan had been repaid in full.

According to PW3 the defendant and the plaintiff were to share the entire 46 acres equally.

On being cross-examined by Mr. Onyinkwa, PW3 confirmed that he was the chairman of the society and later its secretary and originally the members of the society were 100 and each paid a membership fee of shs.21/= in 1968. He further confirmed that the defendant was one of the original members while the plaintiff was not.

He further stated that full repayment of one share in the society was the sum of shs.25,000/= but he did not know how much one was to pay on the Loan.

He knows that the plaintiff is the sleeping partner of the defendant but he doesn't

know how much he had paid towards the Loan repayment.

Whilst insisting that he signed the agreement at the lawyer's office, he said he could not see his signature as he did not have his spectacles in court at that time. He insisted that the defendant was selling five acres of land.

The defendant ORETIATINDA (DW1) testified on his own behalf and stated that he has been a member of Ekerubo Farmers Cooperative Society Limited since its inception.

He also knows PW3 Nahashon Tinega who is a fellow member in the said Society and used to be an acting chairman in that society but never rose to be the secretary of the Society.

That initially they were 100 members in the society and the plaintiff was not one of those original

members.

It is his evidence that it is him who sold the plaintiff five acres of land in his own land for the sum of shs. 18,000/= and it is only on that basis that the plaintiff went into the land. DW1 further stated that whatever they agreed upon was reduced into writing in the offices of D. A. Onyancha and Company Advocates which was signed by the plaintiff, but PW3 Nahashon Tinega was not one of the signatories of the said agreement(Exhibit D1). In fact according to DW1; PW3 was not even at the Advocate's office at the time the agreement was entered.

He denies that the plaintiff came into the land as an equal partner.

DW1 said he knew Matara Onyancha whom he describes as the plaintiff's brother and as this man at one time trespassed into his land, he sued him at chief magistrate's court vide C.M.C.C.C. N0.54 OF 1993 for eviction of that man.

That case was referred to the elders for arbitration and he knows that the panel of elders made a decision that the said Matara Onyancha should remain on five (5) acres of land belonging to his brother. DW1 produced the proceedings - D3 and the court proceedings as Exhibit D2.

It is his evidence that the plaintiff is not entitled to an additional 18 acres of land.

On being cross examined by Mr. Soire, DW1 said that he sold the land to the plaintiff and by 1978 each member had been shown his portion of the land.

doesn't know the year he completed repaying the loan. He denied that the plaintiff made payments into his account with the Society. The defendant further denies that the plaintiff is his partner, otherwise the plaintiff should have also paid shs.10.50. and himself shs. 10.50 being the membership fees to the Society. He very well knows that the agreement entered in the Advocate's office was not a partnership agreement.

The Defendant further stated that there is a clear demarcation of his own land and that he sold the plaintiff and hence the plaintiff is not entitled to 23 acres of land.

He further admitted having sued Matara Onyancha.

At the conclusion of the trial, it is only the defendant's counsel who has submitted written submissions. The plaintiff's counsel brought later.

There were no agreed issues framed by the counsels in this case and hence I have to frame the same.

1. The first question is whether there was a transaction entered between the plaintiff and the defendant in this case.

The answer to that question is quite simple. From the evidence of the parties and the plaintiff's witnesses it is generally agreed that the plaintiff bought a piece of land from the defendant in the year 1978 for the sum of shs. 18.000/=.

This is also confirmed by the contents of Exh PI or D1, being the written statement that was entered and executed by the parties in the offices of M/S. D. A. Onyancha and Company Advocates.

In fact it is not disputed that the sum of shs. 18,000/= was paid in full to the Defendant and the plaintiff took possession of five acres of land.

I have also looked at that agreement and it is clear that, it is only the plaintiff and the defendant who executed the same and PW3 exaggerated his evidence when he said he was one of those who signed Exh.P 1.

Arising from the above, the next question is what is the nature of the transaction that was entered between the plaintiff and the defendant, was it an agreement for the sale of five acres only, or was it an agreement wherein the plaintiff was being brought as a partner over the ownership of the entire share in Ekerubo Farmers Cooperative Society Limited.

The plaintiff himself and PW2 and PW3 were emphatic that the plaintiff was entering into an agreement to be an equal partner with the defendant in the ownership of the defendant's share in Ekerubo Farmers Co-operative Society Limited.

That stand was contested hotly by the defendant who stated that what the plaintiff bought was any five acres of land.

A crack however appears in the evidence PW2 Francis Ogeto Mirigi who admitted in cross-examination that in the agreement that was entered, (Exhibit PI and DI.) What is shown to have been the subject of sale was Ten acres which was to be shared between the two.

That assertion by PW2 in cross examination contradicts what he had said in his examination in chief when he said the plaintiff and the defendant was to share one share. What however puts everything to rest is the agreement itself.

Paragraph 1 of exhibit PI states:-

1." The landlord agrees to incorporate and the partner agrees to join the Landlord's plot measuring approximately ten acres being divided into two halves i.e. five acres for the Landlord and five acres for the Partner."

It is crystal clear from that statement that the subject matter was the sale of five acres to the plaintiff by the Defendant.

Also when it comes to the consideration, the sum of shs. 18,000/= is mentioned, which was to be paid to the defendant.

There is no clause in Exhibit PI showing that the said sum of shs. 18,000/= was to be paid to the society by the plaintiff to offset the defendant's liabilities to that society and the assertions of the plaintiff and that of his witnesses that this was the position is a matter of their own creations.

I do agree with Mr. Onyinkwa's submissions that the plaintiff and his witnesses have made an attempt to introduce oral evidence to contradict a written agreement. The law do not allow that.

What remains therefore is that there is no shred of evidence at all to show that the plaintiff was to share the defendant's share in Ekerubo Farmers Cooperative Society Limited. There is nothing further to show that after entry of the said agreement, the plaintiff would be expecting additional land in the future on top of the five acres he had bought.

The plaintiff read too much into the title of the agreement which is written as "Partnership Agreement" but when one scrutinizes the contents thereon it is nothing more than the purchase of five acres of land from the defendant.

The defendant was candid enough in his testimony. He said he sold the plaintiff five (5) acres of land and gave him possession of the same; and that that is the plaintiff's entitlement and no more.

I have not taken into account the contents of Exhibit D2 and D3 as these exhibits related to the court proceedings in Kisii C.M.C.C.C. N0.54 OF 1993 and the panel of elders proceedings and its award thereon as those proceedings were put on hold pending) the finalisation of this suit. The plaintiff has tried to stretch his luck too much, for he is lucky that the Defendant has not made an attempt to take advantage of the provisions of the Land Control Act which could have made the transaction void for all purposes,

three months after the agreement was entered into.

However as the defendant has not seen it fit to raise that as an issue in this suit, I do not think it necessary to go into that point.

The other point which has been raised by Mr. Onyinkwa is the application of the provisions of the Cooperative Societies Act.

I do not think the application of the provisions of that Act are of any significance in this case, because as stated by the parties themselves and witnesses, the plaintiff never became and is not a member of Ekerubo Farmers Co-operative Society Limited and as a non member he cannot be subject of the provisions of that Act as they do not apply to him and neither can he take advantage of them.

All in all the plaintiff has not been able to prove his case on the balance of probabilities and the plaintiff's suit is hereby dismissed with costs.

Dated and delivered this 26th day of November 2002

P.K.K.A. BIRECH

COMMISSIONER OF ASSIZE