Chelimo & 6 others v Ngobitwa Farmers Co-operative Society Limited & 5 others (Environment & Land Case 314 of 2012) [2023] KEELC 18558 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18558 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 314 OF 2012

EO OBAGA, J

JULY 6, 2023

BETWEEN

JOSIAH SEGUTON CHELIMO ..... 1ST PLAINTIFF

MUSA KANGOGO ..... 2ND PLAINTIFF

JOSHUA KIPKEMEI ..... 3RD PLAINTIFF

ISAAC KIBOWEN ..... 4TH PLAINTIFF

WILLIAM TOMNO ..... 5TH PLAINTIFF

ELIJAH CHEBON ..... 6TH PLAINTIFF

PHILEMON KIPTUKYO ..... 7TH PLAINTIFF

AND

NGOBITWA FARMERS CO-OPERATIVE SOCIETY LIMITED .... 1ST DEFENDANT

GABRIEL CHEMWENO ..... 2ND DEFENDANT

JONAH LAGAT ..... 3RD DEFENDANT

DANIEL TUITOEK ..... 4TH DEFENDANT

JOSEPH CHESIRE ..... 5TH DEFENDANT

BENJAMIN KANGOGO ..... 6TH DEFENDANT

JUDGMENT

Introduction

1. By an amended plaint dated June 12, 2019, the 3rd plaintiff filed this suit against the defendants in which he sought the following reliefs: -

    a. recovery of the 3rd plaintiff's shares and an order compelling the defendants to transfer and issue title deed to the 3rd plaintiff of his shares.

    b. The defendants be ordered to surrender the original title deed of Soy/Soy Blcok 10 (Navillus)/ 2244, together with a duly executed transfer form in favour of the 3rd plaintiff, a signed application for consent of the land control board, 1st defendant's PIN certificate, passport photos of the directors, an order compelling the defendants to transfer and issue title deed to the 3rd plaintiff of his shares.

    c. An order compelling the defendants to tender accounts.

    d. An order compelling the defendants to transfer a further 2.9 acres in favour of the 3rd plaintiff.

    e. In the alternative the defendants be ordered to refund to the 3rd plaintiff the sums equivalent to the 2.9. acres together with interest from the date of filing this suit.

    f. Costs of the suit.

Background ;

2. This suit was originally filed by seven plaintiffs. Six of the plaintiffs later withdrew their claim on grounds ranging from not giving instructions to the advocate to file the suit to amicable settlement. It is only the 3rd plaintiff who has been hanging on to this suit for the last sixteen (16) years.

3. The history of this suit can be traced from February 28, 1994 when a society called Ngobitwa Farmers' Co-operative Society Limited was incorporated (the society). The society was solely incorporated for the purpose of buying land from Lonrho Agribusiness (East Africa Limited) (Lonhro) for distribution to its members.

4. On November 4, 1999, the society purchased eight blocks from Lonrho which in total was about 318.1 hectares equivalent to 785.795 acres. The society's members then formed groups depending on which region they came from. The groups were Chebyemit, Kapsowar, Baringo, Kitale, Mebekei and Kapropita. The 3rd plaintiff came from Baringo group.

5. When the society subdivided the land and distributed to its members and the process of issuance of titles started, the original 7 plaintiffs moved to court and filed this suit alleging that the society officials had given them less acres than they deserved. They wanted the process of issuance of title stopped through injunction but this was dismissed by court. The court however stopped the society's officials from dissolving it until the suit herein was determined.

Third Plaintiff's Case;

6. The 3rd plaintiff testified that he was elected an official of the Baringo group. In a meeting of the society, it was resolved that each member was to purchase as many acres as he/she wished upon payment of Kshs 45,000/= per acre. The 3rd plaintiff paid Kshs 240,000/= which was equivalent to 5.4 acres.

7. The society later took a loan from Co-operative Bank of Kenya Limited and purchased more land. The 3rd plaintiff expressed interest in purchasing 5 acres but the society reduced his acreage to 3 acres as there was no enough land for all the members. The 3rd plaintiff stated that he was entitled to 8.4 acres but on the ground, he is only occupying about 5.3 acres. He therefore claims that he is missing 3.1 acres to make it 8.4 acres.

8. According to the 3rd plaintiff, those whose land bordered swampy area were exempted from donating 0.1 of an acre each per acre for public utilities. The evidence on the missing 3.1 acres was based on his witness statement filed on June 20, 2017. The plaint was amended on June 12, 2019 whereby the 3rd plaintiff sought 2.9 acres as the missing ones which he claims.

9. The 3rd plaintiff while testifying before court stated that he was actually occupying 6.2 acres and that land which was purchased on loan was not affected by the donation of 0.1 of an acre per acre each for public utilities.

10. The 3rd plaintiff called PW2 who was his caretaker on the suit property. He stated that he was aware that the 3rd plaintiff purchased 5 acres during the first phase and another 3 acres during the second phase where the land had been purchased through loan. He stated that it had been resolved by the society that those who had arable land had to give 0.1 of an acre for each acre owned but those whose land was not arable were exempted from giving the 0.1 of an acre for each acre. He stated that as the 3rd plaintiff's land was swampy; he was supposed to have all the 8 acres for which he paid.

Defendant's Case;

11. The defendants through two witnesses stated that the society purchased land through members contributions. It was agreed that each acre was to go for Kshs 45,000/= The 3rd plaintiff who had contributed Kshs 240,000/= got 5 acres. later the society applied for a loan of Kshs 25,000,000/= but was given only 21,000,000/=. The members were asked to purchase each according to his/her ability at the price of Kshs 60,000/= per acre.

12. The 3rd plaintiff wanted to purchase 5 acres but he only paid for 2 acres. The 3 acres were repossessed and sold to other members. The witnesses stated that it had been resolved that each member was to give 0.1 of an acre for each acre owned. They stated that the only blocks which were exempted from giving 0.1 of an acre per each acre were those on blocks 19 and 20. The 3rd plaintiff was on block 7 and that there is no swamp in his land. What happens is that during the rainy season, storm water accumulates on one part of his land.

13. The witnesses stated that the 3rd plaintiff purchased 5 acres at first and after the loan was taken, he purchased another two acres. The total due to him was 7 acres less 0.7 acres leaving a balance of 6.3 acres which is available and for which the society is ready to process title in his name.

Analysis And Determination;

14. I have carefully considered the evidence adduced herein as well as the submissions by the parties. There are two issues which emerge for determination. The first is how much land did the 3rd plaintiff purchase. The second is whether the 3rd plaintiff was exempted from donating 0.1 of an acre for each acre owned for public utilities.

15. On the first issue, there is no contention that the plaintiff purchased 5 acres which had been purchased through members contribution. An acre was going for 45,000/= The 3rd plaintiff had paid Kshs 240,000/. This means that he was entitled to 5.4 acres.

16. The dispute is on how much he paid for the land which was purchased through loan. The plaintiff testified that in 2000, the society set aside 200 acres for Kenya seed to plant maize. He stated that he paid Kshs 33,000/= towards the expenses of Kenya Seed. After Kenya seed harvested its maize the Society gave him credit of 58,510/= as his portion of repayment of the loan which the society had taken.

17. The 3rd plaintiff did not adduce any evidence to show that he had paid Kshs 33,000/= towards expenses of Kenya seed or that he was given a credit of 58,510/= towards repayment of the loan. The only evidence on record is that of Kshs 60,000/= on February 24, 2001. He made another payment of 8000/= on January 26, 2006. He also made another payment of 50,000/= on February 24, 2005. This made a total of Kshs 118,000/=. An acre was going for Kshs 60,000/= This means that he was entitled to 1.9 acres. the total acreage he was entitled to is therefore 7.3 acres.

18. The 3rd plaintiff had claimed that he paid Kshs 32,300/= on December 28, 2006 through his wife. This cannot be true as his wife Ruth Limo Kipkemei was a member of the society in her own right. In the general meeting of February 19, 2005, she was present and was member number 41 on the list of attendees. The 3rd plaintiff was also in attendance and his name appears at number 75 on the list. He cannot therefore claim that the Kshs 32,300/= which his wife paid was paid on his behalf. His wife was paying for her own shares.

19. There is evidence that the 3rd plaintiff had attempted to defraud the society. At one time he brought a receipt purporting that he had paid Kshs 80,000/=. When the society's members went to confirm from the bank, they found that he had only paid Kshs 8000/= In a meeting held on April 11, 2006 in which the 3rd plaintiff was present, the society's committee scrutinized the receipts brought by the 3rd plaintiff and doubted their authenticity. They asked the 3rd plaintiff to bring the originals by end of May 2006. In that meeting, the 3rd plaintiff agreed that some payments to which he was laying credit were for his wife. This document is part of the defence evidence.

20. On the second issue, it is clear from the minutes of February 19, 2005 that the 3rd plaintiff was present during that meeting. Under minute May 19, 2005, it is clear that it was resolved unanimously that each of the members was to give 0.1 of an acre for each acre owned towards public utilities. There were no exemptions given to occupants of block 7. The occupants of block 19 and 20 were given time to decide and agree on the number of public utilities which they needed. This being the case, it is therefore clear that the 3rd plaintiff was not exempted from giving 0.1 of an acre for every acre held.

21. It therefore follows that the 3rd plaintiff was under obligation to give 0.1 of an acre each from the 7.3 acres due to him leaving him with a balance of 6.6 acres. I looked at the pictures which were taken by the county Land Surveyor which were annexed to his report filed in court on August 20, 2020. The report says that the 3rd plaintiff's land has a swampy area measuring 2.22 acres. A look at those photographs clearly show that it is storm water which has accumulated on part of the land. That water cannot even cover the whole of the 2.22 acres. the plaintiff is already occupying 6.234 acres. This is the land which the society is willing to process title for him.

22. There is absolutely no basis for this court to order for accounts and in any case, the issue of accounts of the company can either be dealt with the Co-operative Tribunal or High Court. I therefore have no jurisdiction. Before I conclude, I must point out that after six of the seven plaintiffs withdrew, an amendment was made thereafter. The plaint should have been properly amended to exclude any reference to the parties who had withdrawn. This was not done and it became difficult for the court even to decipher the reliefs sought. I deprecate this casual approach to amendments.

Disposition ;

23. From the above analysis, I find that the plaintiff has failed to prove his case on a balance of probabilities. The same is dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Salim for 3rd Plaintiff.

Mr. Othuro for Defendants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

6TH JULY, 2023