



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 6 OF 2021

TRANS-NZOIA INVESTMENT CO. LTD.....PLAINTIFF

VERSUS

ALBERT GUMO.....1ST DEFENDANT

TOM WANAMBISI.....2ND DEFENDANT

JUDGMENT

Introduction

1. That Plaintiff is a Limited Liability Company duly incorporated under the laws of Kenya. By a plaint dated 29/1/2021 and filed in this court on 1/2/2021, it prayed for judgment against the defendants jointly and severally for:-

a. A declaration that the defendants are neither members nor directors of the plaintiff company and further that the defendants acts of compiling an area list for Nalulingo Farm, LR No. 6486/5 and forwarding the same to the National Titling Centre Trans-Nzoia and the writing of the letter dated 24/9/2020 are illegal, null and void.

b. A permanent injunction restraining the defendants from interfering or intermeddling with the affairs of Trans- Nzoia Investment Co. Ltd.

c. Costs

d. Interest

e. Any other relief or order that this honourable court may deem fit to grant.

The Plaintiff

2. According to the Plaintiff, it is the registered owner of **L.R No. 6486/5** commonly known as **Nalulingo Farm** situate in Endeless Sub-County of Trans Nzoia County. It is its case that the two Defendants are neither members nor directors of the Plaintiff company. It averred further that whereas the Defendants are not members, they have intermeddled with the affairs of the Company by generating a fake area list in relation to the distribution of land parcel No. **6486/5**. The Plaintiff averred that in the year **1998** or thereabouts, it sought consent of the Land Control Board to sub-divide the land which measures **1148** acres among its members. In that step the Plaintiff complied by producing an area list which was approved in **2010** by the Provincial Administration and the District Surveyor. The Plaintiff claimed further that it then surrendered the original title No. of **L.R. No. 6486/5** to the Government in exchange of the sub-division of the scheme under the **Registered Land Act** (now repealed). Subsequently, the Plaintiff was issued with a registration list known as Block **Trans-Nzoia/Kimondo/Block6/Nalulingo (hereinafter known as the "suit land")**.

3. The Plaintiff averred that later the area list was forwarded together with the Registry Index Map (**RIM**) to the land registrar for issuance of titles. Through it some members have been issued with the titles whereas some have not because they had not paid the requisite fees for the registration and issuance of their titles.

4. It is the Plaintiff's claim that in the year **2020** it discovered that that the two Defendants had prepared a fake area list claiming it to be of members of **Nalulingo Farm** and presented it to the Presidential Titling Centre Trans-Nzoia. Their purpose was to have the office prepare titles in favour of the persons named in the fake list. Further the Plaintiff claimed that the Defendants impersonated themselves as the

Chairman and Secretary General of the Plaintiff, signed the fake area list which they presented for preparation of titles, and faked the stamp appearing in the fake area list.

5. The Plaintiff avers that the fake area list comprises of people who are not members of the Company. It also contains some former members of the Plaintiff company who have sold their interest and ceased being members. It prayed that the orders sought be granted.

The Defence

6. The Defendants entered appearance through the firm of M/S Kraido & Company Advocates on **15/02/2021** but never filed a Defence. According to the Affidavit of Service sworn on **19/3/2021** by **George Mumali**, the Defendants were served personally. By entering appearance, it demonstrated that the two Defendants were served with summons to enter appearance. The Plaintiff made a request for judgment against the Defendants on **18/03/2021** and paid for it on **31/03/2021**. The Plaintiff again took a hearing date and filed an Affidavit of Service sworn by Mr. Peter K. Ndarwa on **15/10/2021** to show that they were served through their counsel on **1/10/2021**. They never appeared at the hearing when this case was listed for formal proof upon request by the plaintiff. Upon the court being satisfied that the defendants were served it directed the matter to proceed for hearing *ex parte*.

Plaintiffs' Evidence

7. At the hearing, on **18/10/2021**, **Ronald Sawenja Walubengo**, testified as **PW1**. He adopted his witness statement dated **29/1/2021** as his evidence-in-chief. He stated that he is both a Director and Secretary of the Plaintiff Company. He produced the Plaintiff's Certificate of Incorporation as **P. Exhibit 1**. He testified that the Plaintiff gave a resolution for the Plaintiff to file the case against the Defendants. He produced the resolution dated **25/1/2021** as **P. Exhibit 15**. He testified further that the company has its directors but not the two. He testified that the Plaintiff has a genuine area list which he produced and it was marked as **P. Exhibit 2**. He reiterated the evidence that the Company was issued with a consent of land control board on the **31/8/1998** in reference to L.R. No. **6486/5** which was subdivided into **398** portions. The consent was produced as **P. Exhibit 3**. His evidence was that thereafter the Plaintiff surrendered the title to the government via a letter dated **29/10/2009**, produced as **P. Exhibit 4**. He stated that the letter was acknowledged by the Commissioner of Lands on **29/11/2009**. The acknowledgment was produced as **P. Exhibit 5**.

8. PW1 testified further that the Ministry of Lands converted of the title from the Registration of Titles Act (**RTA**) regime to the Registered Land Act (**RLA**). The new title known as **Kimondo/Kimondo Block 6/1-412**. The conversion letter was produced as **P. Exhibit 6**. His evidence was that thereafter, the Chief Land Registrar wrote to the District Land Registrar confirming the conversion and forwarding the RIM and the area list. The letter from the Chief Land Registrar was produced as **P. Exhibit 7**. He then stated that there was a survey computation from surveyor to the District Land Registrar of Kitale which was stamped on **12/11/2009** but forwarded on **13/11/2009**, produced as **P. Exhibit 8**. It was his testimony that titles were then issued. He produced as **P. Exhibit 9** one of the titles issued to one of the members on **28/11/2011**. The title belongs to one **Pascal Wafula Wambulwa - PW3**. He then produced the **RIM** as **P. Exhibit 10**.

9. His further testimony was that the Company prepared a genuine list comprising of **412** members. The list was signed by the directors and the County Surveyor on the **24/2/2010**, and by the area Chief on **4/3/2010** and by the District Commissioner the same date. He produced the list as **P. Exhibit 11**. He then stated in evidence that titles were issued basing on the authentic area list.

10. The Plaintiff's first witness (**PW 1**) went on to testify that the two Defendants are neither members nor directors of the plaintiff company. They have never any held office of the Plaintiff company. His evidence was that the two Defendants prepared a "**fake list**" of members. It bears **212 members**. He then went on to show how the list was not genuine. He stated in evidence that the list is not genuine because it does not bear a signature, it bears a stamp on it but the said stamp does not belong to the Plaintiff company. He then testified that the two Defendants are not officials as they indicate in the list. He produced the fake list as **P. Exhibit 12**. It was his further testimony that one of the defendants - **Tom Wanambisi** - wrote a letter dated **24/9/2020** to one **Nelson Mutemi** about his parcel of land. He stated that the said **Mutemi** is one of the parcels of land owners. Upon receipt of the letter, **Mr. Mutemi** forwarded it to the directors of the Plaintiff. When they received it, they resolved to institute the instant suit and sought the company's blessings by way of a resolution. He produced the letter as **P. Exhibit 13**. His evidence was that before instituting suit, the Plaintiff instructed their advocate to respond to the letter. He wrote a response dated **18/10/2020** which was produced as **P. Exhibit 14**. He prayed for the orders Plaintiff to be granted as made.

11. PW2, Nelson Mutemi and PW3 Pascal Wafula Wambulwa testified on the same date as **PW1**. **PW2** adopted his witness statement dated **29/1/2021** as his evidence in Chief. **PW3** adopted hers dated **18/10/2021**. Their evidence essentially repeats that of **PW1**.

12. Upon the two witnesses testifying, the Plaintiff closed its case. They moved the Court to close the defence case too. It was ordered so. At that juncture the Plaintiff's counsel indicated that he would not file written submissions.

Analysis and Determination

13. By virtue of the Plaintiff not filing a Statement of Defence, this Court opines that suit is not defended. I have carefully considered the Pleadings herein. I have analyzed the oral testimony of the witnesses called. I have also examined the documentary evidence produced by the Plaintiff. The issues for determination are:

- a. Whether the plaintiff has proved its case on a balance of probabilities to warrant the court to issue the orders sought?
- b. Who bears the costs?
- c. What orders should issue?

14. The issues are analyzed below:

(a) Whether the plaintiff has proved its case on a balance of probabilities to warrant the court to issue the orders sought?

15. Section 107 of the Evidence Act provides,

“(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.”

16. Similarly, Section 109 of the Evidence Act, provides as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

17. He who alleges facts must prove them. The adverse party might as well sit back and relax, unless the law lays on him a specific burden to discharge. It is the Plaintiff who bears the burden herein of showing that the Defendants are not its members and that their activities of preparing a parallel or fake list are not sanctioned by the Plaintiff. It is not in doubt that the Plaintiff company exists: **PW 1** produced as **P. Exhibit 1** a Certificate of Incorporation to that effect. It shows the existence of the company known as Trans-Nzoia Investment Company Limited which is the name of the Plaintiff.

18. Although the suit is undefended, this Court is duty bound to examine both the oral and documentary of the plaintiff to ascertain whether it meets the threshold of the balance of probabilities, that is to say, whether the Plaintiff has proved the assertions before it as required by law.

19. The Plaintiff claims that, **first, the defendants are neither its members nor directors.** To back this claim, the Plaintiff produced as **P. Exhibit 2** a letter from the Registrar general whose date was unclear but refers to the Plaintiff's letter dated **28/10/2002**. The letter relates to the change of directors of the company. This court takes cognizance of the fact the company was incorporated in the year **1969**. Therefore, there is a possibility that some directors were not alive in the year **2002** or were too old to conduct the business of the company thus the need for the change. From the letter though, there are **8 names** of persons who according to the Plaintiff are the known directors of the company. I have perused the letter and found that indeed, the names of the defendant do not appear on the letter. The evidence of the Plaintiff regarding its directorship is uncontroverted. I find nothing to convince this court otherwise or to prove the contrary in favour of the Defendants. I am left with nothing else to believe other than that the names in the list of notification of change of directors dated **28/10/2002** reflects the true position of the directorship of the company.

20. Secondly, it is the Plaintiff's contention that in the year **2020** or thereabouts the defendants prepared a fake list of members of the Plaintiff in relation to acquisition of titles to suit land. They presented it to the Presidential Titling Centre to facilitate the preparation of titles, contrary to the Plaintiff's position and authority. Again, it is upon the plaintiff to prove this allegation.

21. The plaintiff has produced two sets of area lists which he terms as the **“genuine”** and **“fake”** lists. These were marked as **P. Exhibits 11** and **12** respectively. The witnesses gave evidence of what distinguishes the lists and the features that make the list genuine list as it ought to be. Their testimony was that not only was the list signed by the directors but it was passed through and authenticated by the relevant government departments. This court has had the opportunity to peruse through the area lists presented before it. In its analysis, the one termed by the plaintiff as the genuine list contains the names of the members totaling to **412**, the plot numbers and the Identity Card numbers of the members, although the identity card numbers for some are missing. The said list was approved by the Company Chairman, the Secretary and a Committee member. The same has been duly signed and certified as a correct list for titles. It also bears a stamp said by the witnesses to belong to the Plaintiff Company and whose authenticity has not been challenged.

22. On the other there is another area list which the Plaintiff claims to be **“fake”**. I have also perused it. I note that although the list is signed, the signatories thereon are not the directors of the Plaintiff as proved in evidence by the letter dated **28/10/2002** which the Court has made a finding on as evidencing the true directors of the Plaintiff. Similarly, it contains a stamp which the Plaintiff describes as self-made and which does not belong to the plaintiff. No evidence was produced by the Defendant to rebut that fact.

23. This court finds, on a balance of probability that the list containing the **412 members** and produced as **P. Exhibit 11** is the same one presented to the surveyor and lands registry for processing of title and is the genuine one. I conclude so for the reasons given below.

24. The test this Court will apply herein to find out whether the list relied on by the Plaintiff was genuine and authentic or not is a deductive one. The Court is to analyze collectively the documents relied on in evidence by the Plaintiff. If they create a **reasonable uncontroverted narrative**, then the list is genuine. The narrative is: there is a company – the Plaintiff - which claims to have directors on whose authority a list of members was prepared and presented for titling by the relevant government offices and titled issued thereon and members possess those titles and their genuineness has not been challenged. Indeed, the Plaintiff indicates that the genuine list of the members, it was prepared by the Plaintiff's directors and authenticated by the relevant offices and it together with all other documents required for the processing of titles were presented to the registrar for the issuance of titles. True to its word, the Plaintiff called one of its members who has a title which was the end result of the process involving the use of the list. The title deed was for one **Pascal Wafula Wambulwa**. Her National Identity card number in the title deed is **ID/NO. 9021449** which tallies with the one that is indicated in the area list referred to by the plaintiff as genuine. Her name is **No. 60** on the list.

25. On the other hand, no evidence was tendered regarding the other one - the **“fake”** list - to show that it was ever authenticated by the

relevant offices or ever resulted in issuance of a title deed. Perhaps that is why when the Defendants were served with the documents requiring them to answer to this claim, they scampered for ‘safety’ and coiled in some cocoons by not wishing to come and defend this suit. Again, by converse comparison and deduction, I have not seen any names of the title deed holders in the “fake” list. Moreover, **PW2** informed the court that she was issued with a title deed as a result of the process followed by the directors of the Plaintiff company. This corroborated the evidence of **PW 1** and **3**. The process of acquisition of the titles in relation to the “genuine” list was vividly described by the **PW 1** in his evidence. The Court can only conclude that the area list presented by the Plaintiff as the genuine list is as described.

26. It therefore follows that any other list presented by any other person other than the Plaintiff for processing of the titles, in relation to the **Nalulungo Farm**, as at the present time, apart from the one held by the said Party is neither here nor there and is not genuine. Such other list shall in no wise be permitted by any authority to base a claim for titles to land in the **Nalulungo Farm**. If there be any other list, it must emanate from the Plaintiff company through an all-inclusive, open and democratic process wherein all members are informed of and involved in the steps the Company takes. This Court is alive to the fact that many a people in Kenya and elsewhere have been conned by unscrupulous individuals into buying or receiving non-existent parcels of land, or so to say, “in the air” and that has led to misery, economic loss and even bloodshed in some case because of there being no land or being misled to occupying others’ parcels of land. Therefore, courts as guardians of justice must be alert over and cautious about such schemes as those where people prepare fake lists or allocate other people’s land, including government’s, to unsuspecting buyers and then the crooks vanish into thin air with the buyers’ hard-earned resources.

27. I totally agree with the sentiments of my brother Munyao J. who expressed himself as follows in the persuasive case of *James Njoroge Gitau vs Lucy Chepkurui Kimutai (2018) eKLR*

“Now, I do not know the origin of this list for it does not bear a stamp of authenticity from Kalenjin Enterprises. It does appear to me to have been prepared by the Land Registrar, but I have no idea and from what verifying documents, the Land Registrar, made this list. PW-2 categorically denounced this list as a fraudulent one, and I cannot take that lightly. Having been so demonized, it behoved upon the defendant to give a semblance of authenticity to that list, which I am afraid the defendant did not do. Other than merely producing it, the defendant did not try to show that this list is genuine and authentic. I am afraid that given the fact that a director of the company has denounced this list, and there being no evidence to back up its authenticity, I am unable to give that list priority over the register that PW-2 produced. I am thus not persuaded that Kimutai Rotich was ever assigned to own the suit land by Kalenjin Enterprises. He ought never to have been registered as proprietor of the suit property at all. My finding therefore is that his registration as proprietor must have been procured by way of fraud, misrepresentation or mistake.”

28. In the case above, the defendants made efforts to champion their case in court although they failed to prove the origin of the list they were relying in evidence. However, in the present suit, the defendants failed to take their chance to defend theirs. Be that as it may, this court is in the same position as the court above in asking itself where the list compiled by the defendants originated from. It was upon the defendants to prove the origin of that list. Without that, this court faced with such a scenario is only to determine the matter basing on the material before it, which it has.

29. I will not stop here. This court needs to address itself on the issue raised by the plaintiff regarding the conduct of the defendants in relation to the plaintiff’s company business. The plaintiff claims that the actions of the defendants amount to interference and intermeddling of the company business. This court is alive to the fact that company business is a preserve of both its directors and members to the extent that it’s Articles and Memorandum so permit. The Defendants and sundry shall do well to be reminded that a company once duly incorporated such as the Plaintiff, is a legal entity whose identity and life is independent of its shareholders. The seminal case of *Salomon v. Salomon & Co Ltd [1897] AC 22* explains this point well. Not even members can claim to be the Company itself. The case is even worse in relation to a non-member who would purport to take part in the company’s business without authorization from the members: and that must be by way of resolutions duly passed. Therefore, to the extent that this court has already found that the Defendants are neither directors nor members of the Plaintiff, it follows that any activity hitherto purportedly conducted by the Defendants on behalf of the company or otherwise is a nullity *ab initio*. The same amounts to causing unnecessary interference, nuisance and intermeddling of the Plaintiff company’s affairs. Lastly, any subsequent activities by the two on behalf of the Company can only be lawful if they become members and are authorized by the Company as stipulated by law.

Conclusion

30. This court is of the considered view that the Plaintiff has established its case on a balance of probabilities against the defendants. I therefore enter judgment in favour of the Plaintiff as follows:

a. A declaration be and is hereby made that the defendants are neither members nor directors of the plaintiff company and further that the defendants’ acts of compiling an area list for Nalulungo Farm, LR No. 6486/5 and forwarding the same to the National Titling Centre Trans- Nzoia and the writing of the letter dated 24/9/2020 are illegal, null and void.

b. A permanent injunction is hereby issued restraining the defendants from interfering or intermeddling with the affairs of Trans-Nzoia Investment Co. Ltd.

c. The Defendants shall bear the costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF NOVEMBER, 2021

DR. IUR FRED NYAGAKA

