



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 342 OF 2012

KIOKO MUTHOKA.....PLAINTIFF

VERSUS

KALEMBWANI & NGAAMBA FARMERS COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. In the Plaintiff dated 7th September, 2012, the Plaintiff averred that in 1972, he became a member of the Defendant's Company and was issued with a membership number 230; that pursuant to his membership, he purchased shares and was issued with receipts totaling to Kshs.825; that in the year 1974, he relocated to Nakuru and left the receipts with his uncle Martin Kikoi and that in 1978, his uncle informed him that the receipts were lost.
2. According to the Plaintiff, he was informed by the Defendant's company that he had been allocated plot number 73 measuring 5 acres but the same land was given to Shadrack Makundi Mailu (*now deceased*); that when he went to the ground, he found Makundi had fenced off the land.
3. The Plaintiff finally averred that being the legitimate owner of share certificate number 230 and plot number 73 measuring 5 acres, he was entitled to receive the title deed in respect of plot number 73 known as Konza South/Konza South/Block 2/73 measuring 5 acres.
4. In the Defence, the Defendant averred that the Plaintiff did not purchase shares from the company as alleged; that the suit property is registered in the name of Shadrack Makundi Mailu (*deceased*) and that the Plaintiff is not the legitimate owner of the suit property.
5. The Defendant finally averred that the suit as drawn is fatally defective for non-joinder of party (*ies*) and that the ownership of the suit property was determined by the Makueni Land Disputes Tribunal.
6. The Plaintiff filed an Amended Plaintiff in which he averred that in the year 2006, he lodged a claim against the administrators of Shadrack Makundi Mailu at the Makueni Land Disputes Tribunal Case No. 55 of 2006 and that the Tribunal directed that he should file a claim against the Defendant's company so that the Defendant can allocate him his parcel of land.
7. In response to the Amended Plaintiff, the Defendant filed an Amended Defence in which it averred that the Plaintiff has never been its member; that the late Shadrack Makundi Mailu was registered as the Defendant's member in the year 1972 and that Mr. Mailu was allocated plot number 73 regularly. The Defendant averred that the Plaintiff's suit is time barred having been filed over twelve (12) years after the alleged cause of action arose and without the leave of the court.
8. The Plaintiff, PW1, informed the court that he became a member of the Defendant's company in 1972; that his membership number was 230 and that he bought shares in the Defendant's company totaling to Kshs.850/-.
9. According to PW1, when he relocated to Nakuru in 1974, he left all the original receipts that had been issued by the Defendant with his uncle Martin Kikoi; that he lived in Nakuru for four (4) years and later on relocated to Timau where he lived for 27 years and that he returned to Salama in the year 2005 and upon inquiring about his receipts, he was told that the same were lost.
10. PW1 informed the court that when he inquired from the company about his land, he was told that the same had been allocated to one Shadrack Mailu Makundi. According to PW1, he found that indeed Mr. Shadrack Mailu Makundi had fenced the land; that he was advised to sue for the land and that he managed to get two copies of the receipts from the company being receipt numbers 1640 and 3192.
11. According to the Plaintiff, the land he was allocated after paying a total of Kshs.825 for his shares was plot number 73 which was later on allocated to Shadrack Makundi.
12. In cross-examination, PW1 stated that he was entitled to 6 acres from the Defendant; that for one to be a member of the Defendant, he

had to be given a membership card and that his membership card got lost. PW1 stated that he came to know about the invasion of his land by Shadrack in the year 1998.

13. PW2 informed the court that he is a member of the Defendant's company; that he is aware that the Plaintiff bought shares in the Defendant's company and that when the Defendant was allocating land to its members, the Plaintiff was not present.

14. The Director and Secretary of the Defendant, DW1, informed the court that according to the Defendant's register, Mr. Shadrack Makundi Mailu (*deceased*) is member number 230 and was allocated plot number 73 measuring five (5) acres.

15. DW1 stated that the Plaintiff was not a member of the Defendant's company and is therefore not entitled to any benefit due to a member of the Defendant; that due process was followed by the Defendant in issuing to the deceased the suit property and that in any event, the issue of ownership of plot number 73 was adjudicated upon by a Tribunal of competent jurisdiction.

16. DW1 finally testified that the Plaintiff does not appear in the Defendant's Register as a member; that the Plaintiff never complained about his missing name or receipts since the year 1972 and that he only brought up the issue of ownership of the suit land until the death of the registered owner.

17. In his submissions, the Plaintiff's advocate submitted that the plaintiff paid a total of Kshs.825 to the Defendant on 1st October, 1972, 2nd November, 1972, 8th October, 1972 and 1st October, 1972 with the expectation that he was to be allocated 5 acres by the Defendant and that the Defendant fraudulently transferred the Plaintiff's land to Shadrack Mailu Makundi.

18. The Plaintiff's counsel submitted that the suit land should be transferred to the Plaintiff; that the said Shadrack Mailu Makundi was not enjoined in this suit because it is the Defendant who was in charge of the land and that it is not clear how long Shadrack Mailu Makundi had been on plot number 73.

19. The Defendant's advocate submitted that as early as 1978, the Plaintiff knew that the shares allegedly belonging to him were given to Shadrack Makundi Mailu; that the failure to join Shadrack Makundi Mailu in this suit was a fatal omission because it is only Shadrack Mailu who could have explained how he was allocated the suit land and that in any event, the issue of determination of the ownership of Konza South/Konza South/Block 2/73 was determined by the Tribunal in Tribunal Case No. 55 of 2006.

Analysis and Findings:

20. The Plaintiff's case is that in the year 1972, he became a member of the Defendant's company and was issued with membership number 230; that by virtue of the said membership, he purchased shares in the Defendant's company and was issued with receipt numbers 2606, 16401, 3192 and 2607 totalling to Kshs.825 and that all the receipts, according to the Plaintiff, were issued to him in the year 1972.

21. The evidence of the Plaintiff was that when he relocated to Nakuru in the year 1974, he gave one of his relatives, Martin Kikoi, all the receipts. However, he was later on informed that the receipts, together with his membership card, were lost. On inquiry, it was the evidence of the Plaintiff that he was informed that the land he had been allocated by virtue of his shares, plot number 73, had been allocated to Shadrack Mailu Makundi, deceased. The Plaintiff is seeking for the cancellation of the title deed for land Konza South/Konza South/Block 2/73 measuring 5 acres, which, according to the Plaintiff, was illegally given to Shadrack Makundi Mailu.

22. The Defendant's Secretary produced in court the original register of members of the Defendant. The said register shows Shadrack Makundi Mailu being member number 230. The register shows that Shadrack was issued with receipt numbers 2606, 1640, 3192 and 2607 and the allocation of plot number 73 by the company.

23. The court perused the original register and did not see any alterations in respect to membership number 230. Indeed, the issue of whether membership number 230, together with the allocation of plot number 73 by the Defendant, was lawfully registered in the name of Shadrack Makundi was decided in favour of Shadrack Makundi by the Makueni Land Disputes Tribunal in favour of Shadrack on 6th December, 2007. That Plaintiff never appealed against the said decision.

24. Considering that parcel number Konza South/Konza South/Block 2/73 is registered in favour of Shadrack Mailu Makundi, a fact admitted by the Plaintiff, the failure to join the said Shadrack, or his legal representatives, to explain how the land was allocated to him, renders the suit fatally defective. Indeed, it is trite that no person should be condemned unheard. This court cannot hold that registration of the suit land in favour of Shadrack Mailu Makundi was unlawful without hearing the said Shadrack Mailu or his legal representative.

25. In any event, there is no evidence before me to show that the Plaintiff was ever a member of the Defendant. The allegation by the Plaintiff that he was a member of the Defendant in 1972 was not proved at all. Indeed, the Plaintiff did not call the person he allegedly gave his original receipts to explain the circumstances under which the said receipts got lost, if at all.

26. For those reasons, I find that the Plaintiff has not proved his case on a balance of probability. Indeed, the Plaintiff did not prove that the suit property was registered in favour of the late Shadrack Mailu Makundi fraudulently, by mistake or misrepresentation. In the circumstances, the Plaintiff's suit is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020

O. A. ANGOTE

JUDGE