



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 13 OF 2017

JULIUS MACHARIA NJENGA.....PLAINTIFF

VS

METHI & SWANI FARMERS

COOPERATIVE SOCIETY LTD.....1ST DEFENDANT

JOSHUA NDEI RUGA.....2ND DEFENDANT

THE LIQUIDATOR-METHI & SWANI

FARMERS CO-OP SOCIETY LTD.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendants seeking the following orders;

a. The title issued in respect of plot Number MITUMBIRI/WEMPA/BLOCK2/2818 (suit land) to the 2nd Defendant by the 1st Defendant be cancelled and the same do revert to the Plaintiff.

b. Cost of the suit.

2. The Plaintiff avers that as a member of the 1st Defendant he balloted for plot No 2173 which represented plot No 2818 but instead the 1st Defendant unlawfully allotted the plot to the 2nd Defendant who subsequently was issued with a title. The Plaintiff's claim is for the cancellation of the title in the name of the 2nd Defendant and an order that the said title be registered in his name.

3. The 1st Defendant denied the Plaintiff's claim and stated that the suit land belongs to the 2nd Defendant according to their records. That the 1st Defendant is under liquidation and the exercise of issuing titles is now closed.

4. The 2nd Defendant denied the Plaintiffs claim and stated that he acquired the plot from one Julius Mwaura Njenga National ID No 356953 on the 22/9/09 who handed over all the documents to him upon purchase to wit; membership certificate and receipts. Thereafter he was issued with a title. That the caution lodged by the Plaintiff is illegal and sought the removal of the same in his counterclaim. Particulars of illegality are pleaded in para 8 of the defence and counterclaim.

5. The 3rd Defendant did not enter appearance nor file any defence.

6. At the hearing of the suit, the Plaintiff led evidence and adopted his witness statement dated the 26/10/2012. That he is a member of the 1st Defendant and was allocated the suit land for which he paid fully. He produced original documents marked as PEX 1-10 in support of his claim. That he did not sell the land to the 2nd Defendant neither does he know Julius Mwaura Njenga. That he visited the offices of the 1st Defendant severally and each time he got assurance from its Secretary namely John Ngugi that the suit land belonged to him. That he lodged a caution against the suit land claiming licensees interest on the 16/8/12. He produced a certificate of official search to support his case.

7. Further he stated that he became a member of the 1st Defendant in 1976 and balloted for No 2173 in 1978 for plot No 2818 and the titles were issued in 2012. That upon balloting, he was shown the land and he took possession and cultivated until 2010 when the 2nd Defendant entered the land and started constructing a house.

8. That he acquired the land from one Mirara Macharia and took over his ballot and became a member of the 1st Defendant in 1994.
9. That in 2012 he was given a title No 2805 which belonged to a Mr Mungai Njoroge and he returned it to the 1st Defendant and insisted on getting a title for parcel 2818. He stated that although the dispute was submitted to the Land Registrar for determination, he claimed that the Land Registrar did not determine the dispute at all.
10. He further testified that the 2nd Defendant did not purchase the land from Mwaura Njenga as he suspects the said Mwaura Njenga is non-existent. He however did not adduce any evidence to support this position.
11. The Advocate for the 1st Defendant informed the Court that the 1st Defendant does not wish to call any witnesses and he proceeded to close the 1st Defendant's case.
12. The 2nd Defendant led evidence and relied on his witness statement dated the 28/10/2015 together with the list of documents dated the 15/5/19 and marked as DEX 1-8. That he purchased the suit land from Julius Mwaura Njenga in 2009. That the transfer was endorsed or approved by the officials of the Society then upon payment of Kshs 3000/- being transfer fees. Upon payment he took possession of the suit land and settled on it. He informed the Court that he was shown the land by the society's surveyor. In 2011 when the society announced that the titles were ready, he collected his title form the society. On the 17/7/2012 the Plaintiff came to the land and informed him that the land belongs to him. The Plaintiff brought along a title for 2805 which had been issued to him. It then transpired that the ballot no 2173 was duplicated and renamed 2173 -A was for plot No 2805 and 2173-B was for plot no 2818. That the Plaintiff lodged a caution on his land in 2013. With a view to resolve the dispute the matter went before the Land Registrar who determined that the Plaintiff should take the title 2805 and leave the 2nd Defendant with 2818. The Plaintiff being dissatisfied with the said ruling then filed this case.
13. Further he stated that upon purchase of the plot from Mwaura Njenga all the original documents held by the seller were cancelled and his name inserted as was the practice with the society at the time. He refuted claims of fraud and collusion in the acquisition of the title that he holds. He insisted that he register of members is kept by the society.
14. The Plaintiff submitted that the identity of the seller Mwaura Njenga is under investigation by the Directorate of Criminal Investigations Kandara and the said seller was not called to testify as a witness of the 2nd Defendant. That no agreement of sale was produced between the 2nd Defendant and the said seller. That in the absence of an agreement of sale, the transaction runs contrary to the law of contract Act which requires that an agreement to sell land must be in writing. That the transfer form is not stamped and neither have the officials of the society signed it. Conversely, he submitted that the names of the officials that executed the transfer are not disclosed and that the signature of the chairman is not genuine. Neither the transfer form bears the official seal of the society. That the other documents are cancelled and the names of the 2nd Defendant are inserted without any initialization to denote approval. That all these disclose a case of connivance and a scheme to deny the Plaintiff his rightful ownership in the suit land. That the title issued to the 2nd Defendant should be cancelled.
15. The 2nd Defendant submitted that though the Plaintiff stated that he purchased the plot from Mirara Macharia, he did not adduce any evidence in form of either an agreement of sale or a transfer form as was the practice with land buying companies then. That there is no evidence that the Plaintiff paid any transfer fees to facilitate the transfer of the ballot and share to him as he alleges.
16. That the finding of the Land Registrar that the Plaintiff should occupy parcel 2805 has not been appealed but the Plaintiff elected to file a fresh suit. That the Plaintiff failed to plead any of the particulars of fraud in the Plaint and none was proved in evidence. He challenged the ownership claim of the Plaintiff in the face of a caution claiming licensees interest which is different from ownership interest being advertised in the suit.
17. In support of his case the 2nd Defendant relied on the following cases; **Hanna Isak Suleiman Vs Zubedi Bhachu HCCC No 659/1997; Edward Mwangi irungu Vs The Chief Land Registrar & others ELC 96/2016; Wangechi Kibithe Vs Benson Kago HCCA 17 of 2005**, which I have read and considered.
18. Having considered the pleadings the evidence adduced at the hearing and the attendant submissions and case law where supplied, the issue for determination are
 - a. Whether the title held by the 2nd Defendant should be rectified
 - b. Who meets the cost of the suit
19. It is the Plaintiff's case that he is the owner of the suit land having balloted for it, paid by virtue of his membership with the 1st Defendant society. He avers that the 2nd Defendant unlawfully allocated the suit land to the 2nd Defendant. That the registration of the title in the name of the 2nd Defendant should therefore be cancelled and the title issued in his favour.
20. The 2nd Defendant whilst denying the Plaintiff's claim contended that he purchased the plot in 2009 from Julius Mwaura Njenga through a transfer form that was executed by the parties and witnessed by a George Nyoike Karuri and the Chairman and Secretary of the society. That by then the titles had not been issued and members would sell their entitlements in this manner and the documents hitherto held by the previous owner were varied to indicate the new owner. Literally speaking the new owner stepped into the shoes of the previous member awaiting issuance of titles. It is his case that in 2012 when the titles became ready he collected his title from the society offices and it is only in 2012 that the Plaintiff laid claim on the land arguing that he too held a ballot No 2173 for plot 2818.
21. It is to be noted that the Plaintiff failed to plead particulars of illegality in his plaint. Order 2 Rule 4(1) of Civil Procedure Code provides

as follows;

“A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

22. It follows that illegality is one of the matters that require particulars to be disclosed in a pleading. The function of particulars is to ensure that the overriding principle that litigation between parties and the trial should be conducted fairly and openly and without surprises. It is therefore important that all necessary particulars are embodied in the pleadings. Its object is to enable the opposite party know in advance the nature of the case he is faced with, to define and narrow down the issues for the trial and save costs and save the parties from cropping in the dark.

23. This principle is embodied in Section 107 of the Evidence Act which states 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.

24. That notwithstanding, I will now analyze the evidence adduced by the parties.

25. The Plaintiff led evidence that he purchased the shares from one Mirara Mwaura however he did not adduce any evidence in form of agreement of sale and or transfer form to support this acquisition. The Plaintiff did not present the membership register or share certificate in the 2nd Defendant’s society for the Court to confirm whether or not he is indeed a member of the society. This is the one crucial document that would have assisted shed light on the issue of membership. The Plaintiff retains the onus to proof his case on a balance of probabilities and never the other way around.

26. According to the entrance fee receipt, the predecessor of the 2nd Defendant, Namely Julius Mwaura Njenga was registered as a member of the Company on the 15/3/1976 while the Plaintiff’s predecessor became a member on the 13/3/1998. Further the Plaintiff was issued with a share certificate on the 18/10/1994 while the Julius Mwaura Njenga was issued on the 30/6/1980. He was issued with a ballot on the 29/7/1987 while the ballot held by the Plaintiff is disclosed as 2173 is undated.

27. The Plaintiff led evidence that Julius Mwaura Njenga does not exist and that his identity is subject to investigation by the Directorate of Criminal Investigations at Kandara. The Directorate of Criminal Investigations was not called to testify nor produce any report to support this allegation. The onus to proof this fact rested with the Plaintiff but he failed. Allegations are not sufficient. The Court will be moved with tangible evidence on an issue. Further the Plaintiff did not lead any evidence to show that the said Julius Mwaura Njenga refers to himself.

28. I have looked at the transfer form adduced in evidence and I find that the same was executed by the 2nd Defendant and the officials of the society contrary to the allegations by the Plaintiff.

29. Section 26 of Land Registration Act provides two instances that a title may be impeached; first on ground of fraud or misrepresentation to which the person is proved to be a party or secondly where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

30. Section 80 of the same Act empowers the Court to rectify a title by cancellation if the Court is satisfied that its registration was obtained made or omitted by fraud or mistake. None of the above grounds have been proved by the Plaintiff.

31. In order to determine the competing interest of the Plaintiff and the 2nd Defendant the Court will apply the first in time principle so much so to determine which of the two take precedence in allocation of shares and ballot and membership of the society. In the case of **Darelle ltd vs ASL Ltd & 2 others (2015) EKLR** the Court quoted the case of **Wreck Motors Enterprises Vs The commissioner of Lands & others , Civil Appeal No. 71 of 1997** where it was held that;

“where there are competing titles, the one registered earlier is the one that takes priority.”

32. Similarly in the case at hand, in the absence of evidence to support any fraud and or illegality on the part of the 2nd Defendant I find that the ballot and the title subsequently held by the 2nd Defendant and consequently the title takes precedence and priority over the claim of the Plaintiff.

33. It is the finding of the Court that the Plaintiff has not proved his case on a balance of probabilities.

34. Having made the above determination, it therefore follows that the caution placed by the Plaintiff is not justified. In any event it was for a licensee's interest which is at variance with an ownership/beneficial interest in the land. The Plaintiff did not lead any evidence to support the licensee's interest on the suit land nor the justification for the continued existence of the caution. I shall proceed under section 73 of the Land Registration Act to order that the caution lodged on the title on the 16/8/12 be and is hereby removed.

35. Final orders;

- a. The Plaintiff's suit fails. It is dismissed.
- b. The 2nd Defendants counterclaim succeeds.
- c. The caution lodged on the 16/8/12 is ordered to be hereby removed.
- d. The costs of the suit and the counterclaim shall be borne by the Plaintiff in favour of the 2nd Defendant.

36. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF FEBRUARY 2020.

J .G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Present in person. Advocate is absent.

1st Defendant: Absent

Wangari HB for Chris Maina for the 2nd Defendant

3rd Defendant – Absent

Irene and Njeri, Court Assistants