



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 65 OF 2011**

**EDWIN ONCHIRI SIMBA**

**(Suing as the administrator on behalf of the estate of the**

**ISAAC SIMBA ANGWENYI).....PLAINTIFF**

**VERSUS**

**THOMAS ORINA OMWOYO.....1<sup>ST</sup> DEFENDANT**

**ISAAC SHAMWAMA KUBAI.....2<sup>ND</sup> DEFENDANT**

**MIRIAM KUBAI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff vide an amended plaint dated 15/11/2018 and filed in court on the same date instituted the present suit seeking for judgment against the defendants:-

**(i) A declaration that the deceased was a genuine member of Ngorere Co-operative Savings and Credit Society Limited and is entitled to land known as Sinyerere/Sitatunga Block 8/Ngorere/2 measuring 0.8090 Ha, thus the 1<sup>st</sup> defendant be evicted.**

**(ii) An order cancelling the title deed issued to the 1<sup>st</sup> defendant and a new title deed to be issued to the estate of the deceased Isaac Simba Angwenyi.**

**(iii) Mesne profit from 2011 and any other relief that the court may deem fit.**

**(iv) Costs of the suit.**

**The Amended Plaint**

2. In the amended plaint, the plaintiff stated that the deceased **Simba Angwenyi** joined the **Ngorere Co-operative Savings and Credit Society Ltd** (hereinafter referred to as the **Sacco**) in **1974**; that the sole purpose of the Sacco was to purchase **LR No. 3010/6 Trans-Nzoia** which was done; that Isaac was allocated a parcel known as **Sinyerere/Sitatunga Block 8/Ngorere/2** measuring **0.8090 Ha** and **plot No. 18** measuring **25 x 100 feet** and he paid all the requisite subdivision and transfer fees; (*midway through his evidence the original plaintiff withdrew his claim against the 1<sup>st</sup> defendant regarding plot No. 18 and reference to the suit land in this judgement will only be deemed to be reference to Sinyerere/Sitatunga Block 8/Ngorere/2*); that one **Jared Osinde** now deceased a nephew to Isaac was caretaker of the land; that on **25/1/2011** the deceased learnt that the disputed land was registered in the name of the 1<sup>st</sup> defendant herein; that upon inquiry from the District Commissioner's office, Trans-Nzoia East, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants informed him that the land was awarded to the 1<sup>st</sup> defendant by a Land Disputes Tribunal but failed to provide copies of the tribunal proceedings; that the defendants caused the suit land to be registered in the name of the 1<sup>st</sup> defendant through fraud, forgery and misrepresentation on their part and the 1<sup>st</sup> defendant has forcibly entered the disputed land.

**The Defence**

3. The defendants entered appearance and filed a joint statements of defence on **20/12/2011**. The defendants denied the contents of the plaint and averred that the 1<sup>st</sup> defendant is the bona fide purchaser for value without notice having purchased the suit land from one Jared Osinde in **August, 2011** and that he has been in quiet possession thereof; that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants only performed their duty of compiling a list of lawful members of the said farm after thorough scrutiny, inquiry and vetting through the district administration offices which process established that the 1<sup>st</sup> defendant was the owner of the suit land and therefore title was issued to him. The defendants denied the plaintiff has ever been in occupation of the land since **1974**. They further denied the claim to ownership of plot No. 18 and maintained that the deceased has never been a member of the Sacco. They denied forgery and fraud and averred that the 1<sup>st</sup> defendant's title being a first registration under **Registered Land Act Cap 300** is indefeasible even in the claim of fraud.

#### **Plaintiff's Evidence**

4. During the pendency of this suit the original plaintiff testified but later died and was substituted with **PW2, Edwin Ondiri Simba** his son.

5. **PW1**, the original plaintiff **Isaac Simba Angwenyi** testified on **21/1/2015**. His evidence is that the suit land **Sinyerere/Sitatunga Block 8/Ngorere/2** is **2 acres**. He reiterated the contents of the plaint and stated that he was one of the officials of the Sacco; that he was also member **No. 2**; that the Sacco had **69 members**, including a school; that the land was purchased from one Dr. Onyonka in **1974** and that all members were to get equal portions; that the survey was approved by the Ministry of Lands Survey Department and he was shown his plot; that he was in possession of the suit land until **1978** when he left it in possession of his brother; that in **2011** he came to develop his plot and he was asked to go to the District Officer by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants where he learnt that his land had long since been sold; that he was informed that a panel of elders had heard and determined a case and ruled that he was not the owner of the land but he was not provided with any proceedings upon his request; that upon a search he found that the land had been transferred to the 1<sup>st</sup> defendant and proceeded to lodge a caution against the title; that through his Advocate Barongo and Ombasa & Co. Advocates he requested for the tribunal proceedings and from the defendants unsuccessfully; that upon writing to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants asking for details as to how his plot was taken away from him and requesting the clearance certificate which they had issued to the 1<sup>st</sup> defendant, and the clearance certificate was provided to his advocate; that the clearance certificate shows that his name had been deleted and the 1<sup>st</sup> defendant's name entered thereon and it was signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants; that he had never authorized Jared Osinde to give out his land and had not put him into possession of the same and further that Jared was not a member of the Sacco; that he was not aware of the agreement dated **11/8/2001**; that plot **No. 18** was taken by someone else other than 1<sup>st</sup> defendant and therefore he was abandoning his claim against the 1<sup>st</sup> defendant in respect thereof. He prayed for the certificate issued to the 1<sup>st</sup> defendant to be cancelled and that he be declared the owner of the land and be awarded *mesne profits*.

6. Upon cross-examination he denied he is the one who changed the records at the Sacco to read "*Jared Osinde*".

7. **PW2, Edwin Ondiri Simba**, testified on **6/5/2019**. He produced the original grant of letters of administration in respect of his late father's estate and adopted his father's statement in this matter.

8. **PW3, Thomas Nyakundi Magero** testified on **6/5/2019**. His evidence is that he knew Isaac the original plaintiff and that the suit land belonged to him; that **PW3** was the treasurer to the Sacco from **1980 to 1993** while Isaac was member and secretary from **1973** onwards; that he is not aware how the 1<sup>st</sup> defendant was issued with title to the land or how his name was entered into the area list as he was not a member of the Sacco. On cross-examination he testified that he did not know of Zablon Angwenyi Isaac's brother or Jared Osinde and maintained that no one lived on the suit land. He also admitted that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had responsibilities and one of the duties of the committee they headed was the compilation of the area list. He maintained that at the moment no one lives on the suit land.

9. **PW4** was one **Gideon Omwamba**. He testified and adopted his statement dated **25/5/2015** and filed on **22/6/2015** as his evidence-in-chief. His evidence is that he owned land **parcel No. 25** at the Ngorere Farm; that he has been a treasurer of the Sacco from **1989** to date; that he knew Isaac as the secretary to the Sacco since **1970** till his death; that he does not know the 1<sup>st</sup> defendant or how the 1<sup>st</sup> defendant he came to obtain title to the suit land or how he got into the area list. On cross-examination by Mr. Onyancha he stated that he used to cultivate Isaac's plot and that Isaac never lived on the land but in Kisii. He testified that at the moment it is the 1<sup>st</sup> defendant who works the suit land.

10. The plaintiff then closed his case.

#### **The Defendants' Evidence**

11. The defendants on their part testified in furtherance of their case.

12. **DW1** was one **Thomas Orina Omwoyo**. On his part, he stated that he lives in Kisii but owns the suit land having bought it from one Jared Osinde Gichana in **2001** for **Kshs.160,000/=** which sum he paid in full; that Jared had informed him that he owned the land; that Jared and his family had lived on the land; that Jared took him to the office where **DW1** saw Jared's name on the register and paid him for the land; that by then titles had not yet issued and the plots had not been registered at the lands office; that he paid for survey fees, title processing and stamp duty; that he does not know Isaac and was never informed by Jared that the land belonged to Isaac and that no one came to claim the land or to object to the processing of the title in his name after he purchased the land from Jared. He denied the claims of fraud and forgery levelled against him by the plaintiff and maintained that he has lived on the suit land since **2001**. Upon cross-examination by Mr. Barongo he maintained he was shown the area list at the office. When shown **P. Exhibit 1 Entry No. 2** he admitted that the entry read the name of Isaac Angwenyi and that the area list was signed by the Chief and the District Commissioner, and that till **2007** Isaac's name was still on the area list. However he denied having been given a copy of that area list. He denied that any demands or complaints had been addressed to him. Upon further cross examination regarding **D. Exhibit 1**, (his alleged agreement with Jared) he admitted that they never went to the Chief but only to the Committee and that neither the Chief nor the Committee signed on that agreement.

13. **DW2** was **Isaac Kubai Shamwama**, the 2<sup>nd</sup> defendant. He testified that he has lived on Ngorere Farm since **2006**; that he is a member of

the Sacco and was elected chairman by members of the Sacco on **15/12/2010**. He testified further that his first task was to follow up on the processing of titles whose delay had been occasioned by leadership wrangles. He admitted he was part of the team that caused the subdivision of the land, made an area list and obtained titles. According to him the District Commissioner issued a directive that the area list would only be compiled as per the “*ground occupation*”; that further, no objection was raised to the name of Thomas Omwoyo the 1<sup>st</sup> defendant being included in the list from Isaac Simba Ongwenyi or any other person; that the area list was signed by the Chairman, the D.O, the Chief and the Surveyor; that the District Land Registrar and the Surveyor were each issued with a copy of that area list for the processing of the titles. He denied having acted fraudulently in the issuance of the title to the 1<sup>st</sup> defendant and maintained that nobody raised any objection during the long period it took to process the titles. Upon cross-examination he stated that he and his wife the 3<sup>rd</sup> defendant were members of the vetting team; that vetting took a week; that he had not produced the vetting proceedings in court; that he never received Sacco records when he took over the office and he did not know who the former chairman was or rather his predecessor; that he never tried to find out who the previous officials were or obtain the records they had held; that when his vetting committee took the list to the lands office, the lands officials never said there was another list and they just accepted the new list; that the new area list was compiled by the vetting committee members; that by **5/10/2007** when **P. Exhibit 1** the area list was compiled he was not a chairman; that Jared Osinde’s name arose only during the vetting when the 1<sup>st</sup> defendant presented the sale agreement; that the 1<sup>st</sup> defendant was not an original shareholder; that he did not do anything to verify that the 1<sup>st</sup> defendant was a genuine member of the farm as he did not find any need to do so and in any event many other people had sale agreements; that he never dug out the history of the Sacco; that several members in the vetting list were part of the earlier Sacco administration and all of them mentioned Jared Osinde as the original owner who sold the suit land to the 1<sup>st</sup> defendant.

**14. DW3** was **Miriam Kubai** the 3<sup>rd</sup> defendant, who testified and adopted her statement dated **19/12/2011**. She stated that she was elected as a member in **2010**; that Thomas Orina was on the farm by then; that she did not engage in any fraud and that the 1<sup>st</sup> defendant was just a member of the Sacco. She denied the claims of forgery and fraud. Upon cross-examination she stated that during the vetting the vetters took the name of Thomas Omwoyo the 1<sup>st</sup> defendant and substituted it with that of Jared Osinde. She relied on the agreement **D. Exhibit 1** during the vetting. She maintained that the vetting committee could do nothing beyond looking at the agreement to verify that Jared was a member.

**15.** The defendants then closed their case.

**16.** The plaintiff filed his submissions on **15/10/2019** while the defendants filed theirs on **18/10/2019**. I have considered those submissions.

## **DETERMINATION**

### **The Issues and Determination**

**17.** The issues which arise for determination in this suit are as follows:

*(a) Was ISAAC SIMBA ANGWENYI a member of Ngorere Co-operative Savings and Credit Society Limited?*

*(b) Was ISAAC SIMBA ANGWENYI entitled to land known as Sinyerere/Sitatunga Block 8/Ngorere/2 measuring 0.8090 Ha?*

*(c) Was the registration of the 1<sup>st</sup> defendant as proprietor of the suit land fraudulent and if so should the title issued in the 1<sup>st</sup> defendant’s name be cancelled and the 1<sup>st</sup> defendant be evicted?*

*(d) Who should bear the costs of this suit?*

**18.** The above issues are discussed as hereunder.

*(a) Was ISAAC SIMBA ANGWENYI a member of Ngorere Co-operative Savings and Credit Society Limited?*

**19.** The plaintiff states that the deceased became a member of the Ngorere Co-operative Savings and Credit Society Limited in or about **1974**. **P. Exhibit 1** is a list of members. It is signed by various officials in the then local administration and it shows that he was listed as the second member in the society. The District Officer’s signature has a date that is **5/10/2007** affixed next to it. I find that the plaintiff has established on a balance of probabilities that the deceased was a member of the society.

*(b) Was ISAAC SIMBA ANGWENYI entitled to land known as Sinyerere/Sitatunga Block 8/Ngorere/2 measuring 0.8090 Ha?*

**20.** In my view the inclusion of the deceased in the list of members in the year **2007** as per the member’s list produced as **P. Exhibit 1** is conclusive of the fact that he was entitled to land in the society.

*(c) Was the registration of the 1<sup>st</sup> defendant as proprietor of the suit land fraudulent and if so should the title issued in the 1<sup>st</sup> defendant’s name be cancelled and the 1<sup>st</sup> defendant be evicted?*

**21.** A copy of a receipt No. **17** issued in the year **2011** in the deceased’s name was produced as **P. Exhibit 8** to show that the deceased paid Kshs. **5,000/=** at the District Commissioner’s Office. “Plot No 2” is indicated on the face of that receipt.

22. An original of a receipt No. **11** in the name of the 1<sup>st</sup> defendant, dated **13/1/2011** was produced by the 1<sup>st</sup> defendant. It shows that he paid survey fees in respect of the same plot. The latter receipt is accompanied by a stamp duty pay-in slip for the suit land issued in the name of the 1<sup>st</sup> defendant.

23. It must be recalled that the defence of the defendants is that the 1<sup>st</sup> defendant purchased the suit land from one Jared Osinde in august **2001**.

24. The plaintiff's evidence is that when he came to develop the land in **2011** he learnt from the District Officer's Office that it was being alleged that he had sold the land. According to the plaintiff Jared Osinde who is alleged to have sold the land is his nephew born to his sister, but he had no authority to sell the land. He is also deceased, having met his demise in the year **2004**.

25. According to the plaintiff he had not put Jared Osinde in charge of the suit property. Jared was also not a member of the Ngorere Cooperative and Savings Society.

26. Under cross-examination he stated that he moved out of the suit land in **2004** and left the land to one Zablon Omweri. He also denied knowledge of **D. Exhibit 2**, an agreement dated **11/8/2001** between Jared Osinde Gichana and the 1<sup>st</sup> defendant.

27. The plaintiff having demonstrated that he was a member of the society and was entitled to the suit land it was incumbent upon the defendants to demonstrate that the land was properly transferred to the 1<sup>st</sup> defendant.

28. Their reliance on the agreement produced as **P. Exhibit 2** calls for evidence that Jared Osinde had the authority of the plaintiff to sell the land. Unfortunately no evidence of such authority was proved. Only a copy of an area list bearing the date **6/1/2011** was produced by the defendants. In place of the details of the deceased reflected in **P. Exhibit 1**, that area list bore the name of the 1<sup>st</sup> defendant

29. Leaving land in the care of a relative is a common thing in African societies. However it is clear that some relatives may abuse the trust bestowed upon them. Where the land has not been shown to have been sold to these relatives by the owner, it behoves whoever claims to have purchased to provide evidence that they not only demanded but they also got reasonable proof that those relatives had authority from the owner to sell the land. In this case the mere production of an area list does not amount to such proof.

30. The agreement dated **11/8/2001** totally betrays the fact that Jared Osinde purported to sell what he considered his share in Ngorere Farm to the 1<sup>st</sup> plaintiff. It is amazing that his name was not even transitionally reflected in the farm records.

31. The only change proved to have occurred between **2007** and **2011** was the transition from the deceased's name to the 1<sup>st</sup> defendant's name on the area list of the farm.

32. The evidence of **DW2** was that when he became chairman he never consulted the records previously held by the former officials of the Society, and the area list was compiled as per "*ground occupation*". I find this reliance on "*ground occupation*" to be a potential recipe for fraud.

33. According to **DW3** the vetting and acknowledgement of the 1<sup>st</sup> defendant as a member of the society was done without any reference to the previous society records.

34. Since Jared Osinde was already dead at the time of the hearing, he was not called as a witness. I agree with the plaintiff's submission that no independent defence witness was called to confirm that Jared Osinde was a member of the society. Besides, no independent witness was called to confirm the genuineness of the sale agreement dated **11/8/2001**. It can not even be verified whether the same was ever signed by Jared Osinde.

35. By failing to bring the expected evidence as set out above, the defendants failed to show that the alleged sale of the land by Jared Osinde to the 1<sup>st</sup> defendant was genuine or that he had authority to sell the land. In the absence of such evidence this court is convinced on a balance of probabilities that the registration of the suit land in the name of the 1<sup>st</sup> defendant is not supported by a valid sale agreement and transfer and that it is therefore fraudulent.

36. In the case of **Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR, Nyeri Civil Appeal No. 239 of 2009**, the Court of Appeal noted as follows:

**"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."**

37. The most appropriate remedy in the circumstances of this case is the cancellation of the resultant title issued in the name of the 1<sup>st</sup> defendant and an order of eviction of the 1<sup>st</sup> defendant.

**(d) Who should bear the costs of this suit?**

38. The defendants are the authors of the mischief that led to this suit. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants contributed to the necessity of this suit by

their negligent conduct of including the 1<sup>st</sup> defendant in the area list even though such inclusion was, in view of the lack of evidence that Jared Osinde had a share in the Society and had no authority to sell the suit land, clearly wrong.

## **CONCLUSION**

### ***(e) What orders should issue?***

39. In the final analysis I find that the plaintiff has established his claim against the defendants and I enter judgment in his favour against the defendants jointly and severally and I issue the following orders:

**(a) A declaration that the deceased Isaac Simba Angwenyi was a genuine member of Ngorere Co-operative Savings and Credit Society Limited.**

**(b) A declaration that the Estate of the deceased Isaac Simba Angwenyi is entitled to the land known as Sinyerere/Sitatunga Block 8/Ngorere/2 measuring 0.8090 Ha.**

**(c) A declaration that the registration of the land comprised in the title no. Sinyerere/Sitatunga Block 8/Ngorere/2 measuring 0.8090 Ha. in the 1<sup>st</sup> defendant's name was fraudulent.**

**(d) An order that the 1<sup>st</sup> defendant shall remove himself from the suit land and in default be forcibly evicted therefrom.**

**(e) An order cancelling the title deed issued to the 1<sup>st</sup> defendant and that in lieu thereof a new title deed be issued by the County Land Registrar in the name of the estate of the deceased Isaac Simba Angwenyi.**

**(f) That the defendants shall bear the costs of this suit.**

**Dated, signed and delivered at Kitale on this 10<sup>th</sup> day of February, 2020.**

**MWANGI NJOROGI**

**JUDGE**

**10/2/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Sambu holding brief for Barong for plaintiff

Ms. Kiarie holding brief for Onyancha for defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**10/2/2020**