



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 57 OF 2005

SAMUEL MUINDI.....PLAINTIFF

VERSUS

MALILI RANCH LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff filed this suit seeking an order compelling the directors, agents and or servants of the defendant company to reinstate and or include his name in its registered roll of shareholders and costs of this suit.

2. He pleaded that he was at all the material time a shareholder of five shares having duly paid the requisite registration fees of KShs. 100/= and subsequently KShs. 5,000/=. That as a result of the same, he was a bona fide shareholder/member of the defendant company and was entitled to any benefits that accrued as a result thereof. That he has in the recent past learnt that the defendant company through its directors, agents and or servants that they intend to allocate land parcels through balloting exercise and his name is not among the registered ballottees and he stands to suffer damage, loss and expense due to defendant's fraudulent activities. The alleged fraudulent activities were that:

a) The defendant company has unlawfully and fraudulently removed the plaintiff's name to deny him the chance of being allocated land.

b) The defendant company through its agents/servants have fraudulently and without reason removed the plaintiff's name from its register with the sole intention of denying him any benefits that may accrue to shareholders/members.

c) That the plaintiff is a bona fide shareholder and is entitled to have his name presented for balloting and subsequent allotment of a parcel of land.

3. He averred that as a consequence of the illegal unlawful and fraudulent action of the defendant company, he stands to suffer damage, financial ruin and expense if his name is not included in the list of bona fide registered members.

4. In its defence filed on 14th July, 2005, the defendant denied the plaintiff's claim and maintained that the plaintiff is not a member and does not hold shares with the defendant company. The defendant contested that the plaintiff's suit is incompetent, bad in law and is an abuse of court process.

5. The plaintiff testified that he paid KShs. 100/- being membership fee and was issued a receipt which bore the name Aimi Ma Kilungu Limited. That he was later transferred to Malili Ranch and each member was supposed to pay a sum of KShs. 5,000/- for the shares. He produced a receipt dated 23rd February, 1985 and a letter dated 16th March, 1985 acknowledging payment of KShs. 5,000/- for shares. He stated that he was not issued with any membership card or given land. That he saw a newspaper advertisement dated 21st June, 2006 announcing balloting of membership. The newspaper was produced as P. Exhibit 3. That he then wrote a letter dated 12th February, 2004 protesting to the defendant (P. Exhibit 4) to no avail necessitating the filing of this suit. That the defendant sought to set aside the suit and give him two plots but the same has not been done. He produced a consent as P. Exhibit 5. He stated that he does not have a certificate for Malili Ranch and has never received any dividends to date and that he is not aware that members get dividends. That he does not have any allotment for the plots. He denied that two cheques were returned to him as per his letter dated 12th February, 2004. He stated that his then advocates Mr. Ndolo drafted the letter dated 12th February, 2004 and that he did not inform him to return the cheques to the company.

6. James Kituku Munguti (DW1) testified that he does not know the plaintiff and that he is not aware of Aimi ma Kilungu ranch since it is different from Malili Ranch. He stated that the plaintiff should direct his complaint to Aimi ma Kilungu Ranch. He stated that the Ranches were one entity before but later split with each having their register of members. Each of the ranches also appointed their own directors. He stated that it was then that he was appointed as a director of Malili Ranch. That he was appointed in the year 2003 but he cannot remember the exact date the two ranches split. He stated that he is the custodian of Malili Ranch documents and that the plaintiff is not listed as a member of Malili Ranch. He stated that the letter dated 12th February, 2004 (P. Exhibit 4) is written by the chairman of Aimi Ma Kilungu

and shows that the plaintiff has been refunded his money. He further stated that the letter dated 16th March, 1985 is from Aimi Ma Kilungu and that the plaintiff's application for membership was rejected. That the sum of KShs. 100/- was in respect of application for consideration. He maintained that the plaintiff was not a member of Malili Ranch. On cross examination, he stated that balloting took place in the year 2007 when he was only a director and not a secretary. That the records were handed over to him but he did not have the register in court. That the board decided in an executive meeting to ballot for members who were not present but that he was not an executive committee member. That there were instances of fake ballots and of members failing to have the ballots registered within 3 months. That in such cases, those ballots were nullified. He stated that those with fake ballots would be charged but that the plaintiff was never charged with such. He acknowledged that he has not tendered evidence to the effect that Aimi ma Kilungu is still in existence.

7. It is the plaintiff's submission that the defendant did not tender evidence to prove that Malili Ranch and Aimi ma Kilungu Ranch split. That in fact it is the defendant that issued the cheques dated 18th June, 1992 and 7th April, 1993. It was submitted that the plaintiff met the requirements to be declared a duly registered member. That allotment letter and dividends slip were acquired after the balloting exercise. That having established the coexistence of both societies, the plaintiff's membership and the fact that all other members were each allocated a commercial and agricultural plot, it follows that the plaintiff is entitled to the same.

8. The defendant on the other hand submitted that the plaintiff never produced; membership card, membership certificate, allotment letter, receipt in proof of payment and previous dividend slip which were necessary to prove that he had been provided with an allotment letter for agricultural land by the defendant. That in absence of the same, he has no reasonable ground to claim membership of the defendant company. It was further submitted that the plaintiff was refunded membership fee of KShs. 5,000/- and therefore he automatically lost the rights and privileges as a member of the defendant company.

9. I have given due consideration to the rival pleadings, evidence and the submissions. From the evidence tendered, it is clear that the plaintiff applied to be a member of Aimi Ma Kilungu Limited and it is the said company that refunded him KShs. 5,000/- vide a letter dated 12th February, 2004. He stated that he did not bank the cheques sent to him. While the defendant denies that the plaintiff is not a member of the defendant, DW1 acknowledged that it and Aimi Ma Kilungu were one company but later split. The defendant has however not tendered any evidence in that respect. An adverse inference is therefore made against the defendant bearing in mind that it is the custodian of the membership list but failed to furnish the court with the same to prove that in deed the plaintiff was not a member as it claimed. DW1 did not explain why he failed to avail the said documents. The plaintiff having claimed membership, it was prudent upon and the burden shifted to the defendant to prove otherwise. I note that the plaintiff produced a letter whose contents were to the effect that he was issued with two cheques to refund the membership fee of KShs.5,000/- but that he did not bank the same. Having not banked the same, the money was then not transferred to him and defendant failed to account for the said sum. It is also unclear and unexplained why the defendant waited for 19 years to refund the money. It would appear to me that during that period the plaintiff must have been a member and shareholder and thus entitled to shares and dividends. It is clear that the Defendant wants to use the guise of a split of the two companies and proceed to throw the plaintiff under the bus. In any case were the defendant to seek to refund monies after 19 years then it ought to include interest. The defendant has not availed the evidence that the plaintiff indeed received the refund by way of a bank statement showing a debit entry in its bank account prior to the alleged split. The defendant's witness came out as an untruthful as he seemed to be out to hide certain information such as the records of members. He sounded dismissive when he suggested that the plaintiff should go peruse the records himself yet it was incumbent upon the defendant to disprove the allegations made by the plaintiff. Further the defendant had earlier entered into a consent with the plaintiff to the effect that the plaintiff was to be allocated certain parcels of land and which consent has not been set aside to date. This thus bolsters the plaintiff's claim of entitlement to some land to be allocated to him by the defendant. In the circumstances, I find that the plaintiff has proved his case against the defendant on a balance of probability and order that:

i. The Directors, agents and or servants of the defendant company do forthwith reinstate and or include the plaintiff's name in its register/roll of shareholders and allocate him the two plots set aside as per the consent dated 21st July, 2006.

ii. Costs of this suit are awarded to the plaintiff plus interest at court rates.

It is so ordered.

Dated and delivered at Machakos this 18th day of September,2019.

D.K.KEMEI

JUDGE