



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 131 OF 2004

ALFRED JUMA WANAMBISI.....PLAINTIFF

VERSUS

SAMMY SIMIYU KATATA.....1ST DEFENDANT

ALICE NALIKA SIMIYU.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff commenced this suit by way of plaint dated **22/12/2004**. He subsequently filed an amended plaint dated **18/1/2005** on **25/4/2005**. In the amended plaint the plaintiff sought the following orders against the defendants jointly and severally:-

(a) A declaration that the plaintiff is the sole and absolute owner/proprietor of land parcel No. 44 Namanjalala Farm to the exclusion of the defendants and other persons and/or parties and an order of permanent injunction does issue restraining the defendants, their agents, servants and/or anybody acting through them or on their behalf from trespassing upon the plaintiff's land parcel No. 44 Namanjalala Farm.

(b) An order of eviction do issue against the defendants.

(c) Costs of this suit plus interest at court rates.

(d) Any other relief this court may deems fit and just to grant.

PLEADINGS.

The Plaint

2. In the amended plaint, the plaintiff averred that he is the lawful owner of plot number **44** in **Namanjalala Farm** in Trans Nzoia District measuring **10.8 acres**; that in **2003** the defendant trespassed onto the suit land and has been in occupation since and should be evicted therefrom and that two previous suits exist regarding the subject matter.

The Joint Defence

3. In their joint defence the defendants denied the claim. The 2nd defendant averred that she is the owner of **Plot No Kwanza Namanjalala 568** measuring **4 acres** which she occupies; that in a land disputes tribunal case the plaintiff successfully claimed **3.8 acres** from the defendant's land, but the Eldoret High Court subsequently quashed the tribunal award.

PLAINTIFF'S CASE

4. **PW1, Alfred Juma Wanambisi**, the plaintiff testified on **19/3/2019, 23/10/2019** and on **28/10/2019**. He adopted his recorded statement filed on **29/1/2019** as his evidence-in-chief. His evidence is that he bought **plot no 44** measuring approximately **10.8 acres** from one **Charles Ngoya Macheso** in **1979** and paid the consideration of **Ksh 16,500/=** in 2 instalments: the first on **1/9/1979** and the second one on **31/12/1979**; that the **share certificate no 45** for **285.5 shares** was transferred to him; that he was registered as a shareholder by the Board of directors of Trans Nzoia Investment Company; that he took up possession of the land; that in **1992** the defendant forcibly entered the land

and fenced off 4 acres and built a temporary structure, claiming to have purchased the same from the company; that he lodged a Land Disputes Tribunal case against the defendant and was awarded the land; that he obtained a court decree thereafter but the defendant refused to vacate the land; that the defendant has continued with her occupation of the suit land and processed a title deed in her name over a portion thereof which was then christened **Kwanza Namanjalala Block 5 /568** notwithstanding the existence of an injunction of this court issued on **20/3/2006**; that he has never sold the land to the defendant nor allowed the directors to dispose of any part thereof and therefore the title to the parcel the defendant holds was obtained irregularly. The plaintiff produced various documents in support of his claim and then closed his case.

5. Upon cross-examination the plaintiff stated that the land is not surveyed. He also admitted that the agreement dated **1/9/1979** was not taken to the Trans Nzoia Company Ltd and no company official's signature features in his documents and that he does not possess a share certificate in his name; that no **44** is his area list number and no **775** is the plot number; that company officials brought the defendant and pointed out the land to her; that when he went to the company office to complain the secretary informed him that part of Ngoya's land had been excised and sold by reason of his failure to pay in full the dues owed to the company; that he had never been notified of such an intention to excise the land and that he is not aware that the tribunal decision was quashed.

The Defendant's evidence

6. **DW1, Alice Naliaka Simiyu**, the 2nd defendant testified on **6/11/2019** and adopted her written statement dated **16/2/2019** as her evidence-in-chief. Her evidence is that about the year **1991** applied to become a member of the Trans Nzoia Investments Company Ltd and she purchased shares in the company and was given a share certificate for **100** shares; that she was informed that there was land available; that that survey of the land was ongoing; that people who had more land than their shares would have their land reduced and those who had less would have the sizes enhanced to their correct entitlements; that in early **1992** the **4** acres were pointed out to her by the directors of Trans Nzoia Investments co Ltd; that the plaintiff protested when she tried to take possession of the land; that she then took up possession of the land and has occupied it since; that the plaintiff commenced proceedings at the land disputes tribunal claiming **3.8** acres and failed to serve her with process; that he obtained judgment in the proceedings but the award was subsequently quashed by the High Court; that the plaintiff nevertheless obtained an eviction order in the lower court despite the quashing of the tribunal decision by the High Court and the defendant subsequently had the eviction order set aside; that her late brother processed title for the land on her behalf; that the injunction earlier issued in this suit was lifted; that the plaintiff refused to accompany her to the company offices for a resolution of the dispute and that the land was fallow at the time of her taking of possession.

7. **DW2, Ronald Sawenja Walubengo**, testified on **25/11/2019** and adopted his written statement dated **16/2/2019** as his evidence-in-chief. His evidence is that he is a director/secretary of Trans Nzoia Investments Ltd; that he became a member in **1970**; that the company owned **LR No 2048**; that members took possession in **1969**; that occupation was on a temporary basis at first; that the size of portions of land allocated to members depended on the number of shares; that survey began in **1990**; that a meeting of the company resolved that the land be allocated as per shares held; that anyone who occupied a larger area than he had paid for would have the land reduced; that the plaintiff is a shareholder having bought land from *Richard Wafula Macheso*; that the two never came to the company directors before transacting over the land; that *Richard Wafula Macheso* had paid for about six (**6**) acres of land but had occupied more than ten acres; that the defendant was not allocated land immediately upon purchase; that she purchased **100** shares; that the land went through an approved physical planning process and then a survey process; that consent to subdivide the company land into **1704** parcels was issued; that he compiled the area list after survey was complete; that the plaintiff's plot is number **569** measuring **2.567 ha** which was the equivalent of the land paid for by *Richard Wafula Macheso* and which he is in occupation of; that the plaintiff never demanded from the company to know why the land was reduced in size; that the defendant occupies parcel no **568**; that the original parcel's title was surrendered to the Ministry Of Lands upon subdivision; that the company asked for a partial release of titles so that titles paid for could be released; that plot number **44** does not belong to the plaintiff.

8. Upon cross examination by Mr Kraidon for the plaintiff he stated that the land that the plaintiff purchased from *Macheso* had no number at the time of purchase and that at that time the exact acreage each shareholder was to get had not been established as survey had not been conducted; that the plaintiff took possession of the land in **1980** when survey had not yet been conducted; that the defendant took possession in **1992**; that before survey the management asked members to enhance their shares; that upon survey, older member's land was taken up and sold to newcomers and many members were affected by the reduction in acreage. The defendant then closed her case.

SUBMISSIONS

9. The defendant filed her written submissions on **27/1/2020**, while the plaintiff filed his submissions on **17/2/2020**.

ANALYSIS AND DETERMINATION

10. Having considered the available evidence and the submissions herein, the court finds that the issues arising for determination in this suit are as follows:

(a) Did the plaintiff own plot number 44 in Namanjalala Farm in Trans Nzoia measuring 10.8 acres?

(b) Did the defendant trespass onto the plaintiff's land and forcibly occupy it?

(c) What orders should issue in this suit?

11. The issues are addressed as here below:-

(a) Did the plaintiff own plot number 44 in Namanjalala Farm in Trans Nzoia measuring 10.8 acres?

12. Whileas the plaintiff pleads that his plot is number **44** it transpired during the hearing that his plot is number **569** and that plot number **44** is situated far away from the site occupied by the plaintiff. Besides, none of his documents, including his agreement with *Charles Ngoya Macheso* reflect number **44** as the plot he bought. **PExh 1** speaks of **10.8** acres of land. It is dated **1/9/1979**. The evidence of **DW2** is that by then the land had not been surveyed and that members' occupation was only temporary until the survey was done. **DW2** testified that before the survey, members were asked to enhance their shares and that during the survey members got the portions of land equivalent to the shares that they had paid for in full. It is clear from the evidence given in this case that what was sold to the plaintiff was land that *Mr Ngoya* had occupied and that the parties to the sale agreement dated **1/9/1979** did not visit the company to verify that *Mr. Ngoya* owned that extent of land.

13. Assuming that **287.5** shares represented the **10** acres occupied by *Mr Ngoya* a series of mathematical calculations is necessary to establish if the shares were paid for.

14. Therefore, for this court to find that the plaintiff is the owner of **10.8** acres of land, it must be established by way of evidence that either *Mr Ngoya* had paid for and was at the time of the sale agreement entitled to all that **10.8** acres he sold to the plaintiff, or that the plaintiff paid up the shortfall that may have remained unpaid by *Mr. Ngoya*.

15. I have noted that the plaintiff produced evidence of his direct payment to the Company of money for shares , being receipt no **91** dated **10/8/90** for **1000/=** and Receipt no **28350** dated **1/9/1979** for **Ksh 1122/=** as well as the survey fee receipt for **Ksh 245/=** dated **11/12/1990**.

16. The receipt no **23331** for **Ksh 1378** is not acceptable to this court because the alterations thereon are not explained.

17. As the receipts nos **91** and **28350** are not disputed by the defence, they are taken to be genuine payments and the plaintiff was entitled to shares by virtue of those payments.

It will also be presumed that receipt no **20593** is genuine since it was not disputed by the defence. The total shares paid for by the plaintiff *and Mr Charles Ngoya* being the total sum of the receipts herein before mentioned is **ksh 3822/=**. If **ksh 20/=** was the value of each share a simple calculation would show that that amount entitled the plaintiff to **191** shares. This differs with the amount that is reflected on the share certificate.

In this court's view, evidence of payment for all **287.5** shares would have been necessary in order to prove that the plaintiff was entitled to all the land represented by **287.5** shares. The plaintiff has failed to prove that all the **287.5** shares were paid for or that he was entitled to the **10.8** acres he claims.

(b) Did the defendant trespass onto the plaintiff's land and forcibly occupy it?

18. The defendant's evidence is that she purchased land from the company and paid for it. She stated that she was shown the parcel by the company officials. This evidence was corroborated by the plaintiff who never enjoined the company as a party to the suit.

19. It was the evidence of **DW2** that when the plaintiff and *Charles Ngoya* contracted over the **10.8** acres they never went to the company office to register their transaction. The plaintiff admitted in his evidence that the agreement dated **1/9/1979** was not taken to the Trans Nzoia Company Ltd upon execution and no company official's signature features in that agreement. This evidence was corroborated by **DW2**. However, the plaintiff's name somehow appears in the area list and the transfer between him and the seller must have been communicated to the company at some point in time, and the company must have subsequently taken cognizance thereof in order for his name to be included in the area list.

20. The purchaser of unregistered land in a land buying company must always ensure that the purported owner of whatever portion he intends to purchase is recognized by the company and that the status of the account of the seller with the company is clean. This is because matters relating to planning subdivision and distribution of unregistered land held by a land buying company are specifically within the mandate and the knowledge of the company through its officers. Ascertainment of status of the land to be purchased must be done *before* the transaction and in my view it is necessary to obtain some form of assent or formal recognition of the transaction by the company which it would not subsequently be able to run away from.

21. In the present case *Mr Ngoya* appears to have overshot his entitlement to land in the Farm by sale of all **10.8 acres** before he had paid for that acreage. Although the plaintiff purchased the land before survey, he never ascertained if it was fully paid for. He has also not demonstrated that he paid for the excess land before the survey that carved out the defendant's plot from the area he earlier on occupied.

22. Consequently, it appears to this court that the company was in a position to sell the excess land occupied by *Mr Ngoya*, who was succeeded by the plaintiff, to the defendant. The defendant can not therefore be deemed to be trespassing on the plaintiff's land. She is in occupation of her own land legally purchased from the company.

(c) Who is to bear the Costs of the suit?

23. However it is noteworthy that the company never gave the plaintiff specific notice that he was in occupation of excess land, or given him an option to purchase it, and therefore each party shall bear their own costs of the suit.

24. The upshot of the foregoing is that the plaintiff has failed to prove his case on a balance of probabilities against the defendant. I therefore dismiss the plaintiff's case subject to the order on costs as stated above.

It is so ordered.

Dated, signed and delivered via teleconference at Nairobi this 20th day of May, 2020.

MWANGI NJOROGE

JUDGE ELC, KITALE

In the presence of:

Ms. L. Kiarie holding brief for Mr Kiarie for the defendant.

N/A for the plaintiff.

Hon Mercyline Lubia DR.

MWANGI NJOROGE

JUDGE, ELC, KITALE