



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 233 OF 2012

WILLIAM ZULU MATELONG PLAINTIFF

VERSUS

SIRGOI HOLDINGS LIMITED DEFENDANT

JUDGMENT

The Plaintiff's claim against the Defendant is for:-

- (a) An order directing the Defendant company to effect transfer of 8 shares purchased from Johnson Kipkerich Rop and causes the same to be registered in the name of the Plaintiff.**
- (b) That the Defendant company be directed to pay costs of this suit.**
- (c) Any other further relief the Honourable Court may deem fit to grant.**

By the plaint dated 19th December, 2012, the Plaintiff avers that at all material time, he was a registered shareholder with the Defendant Company wherein he owned thirty nine (39) shares. That sometime in December, 2000 he purchased additional eight (8) shares from Johnson Kipkerich Rop at a value of Ksh. 8,000/= which he fully paid. He thereafter delivered a sale agreement together with transfer forms to the Defendant so that it could effect the transfer of the said shares into his name but it failed to do so for no apparent reason. He avers that the failure by the Defendant to transfer the said shares violated his constitutional right to own property.

He further avers that save for **ELDORET CHIEF MAGISTRATE'S CIVIL CASE NO. 564 OF 2011** which was struck out for want of jurisdiction, there is no other pending suit between the parties in the same subject matter.

In an amended defence dated 28th January, 2013, the Defendant denies the Plaintiff's claim. It states that the said John Kipkerich Rop from whom the Plaintiff allegedly bought the eight shares owned only three shares and could not therefore purport to sell eight shares to the Plaintiff.

In the alternative and without prejudice, the Defendant avers that even if the Plaintiff bought the eight shares from the Defendant, then the suit is premature for the following reasons;

- (a) The said Johnson Kipkerich Bor had purported to sell his 3 shares together with 5 shares of his deceased father without proof of beneficial ownership.***
- (b) The Plaintiff has refused and/or neglected to avail to the Defendant company all the documents proving that he legally bought the said shares.***

(c) The Defendant company has on numerous occasions invited the Plaintiff to call on the Defendant company with the seller of the shares to facilitate the transfer but he has failed to do so.

(d) The Plaintiff has never supplied the Defendant with the prescribed form of transfer duly executed by the transferor and the transferee.

With regard to suit **CMCC. NO. 564 OF 2011 – WILLIAM ZULU MATELONG -VS- SIRGOI HOLDINGS**, the Defendant avers that the same is still pending before the Magistrate's court for taxation of the Bill of Costs and that it was dismissed for want of jurisdiction and on merit.

The Plaintiff testified as PW1. He stated that in December, 2000 he bought 8 shares from one John Rop who then lived in Nyahururu. The sale agreement was drafted by the Chief which both parties executed. He then delivered the said agreement to the Defendant company's offices in Eldoret. At the time, John Rop had surrendered his share certificate for the eight shares, payment receipts for the shares, a copy of his identity card and a copy of the death certificate for his father. According to PW1, these were the documents the Defendant company required so as to effect the transfer of the shares into his name.

He testified that the directors of the Defendant company declined to effect the transfer of the shares. He also requested them to furnish him with a copy of the Memorandum and Articles of Association so that he could ascertain whether the directors had powers to effect the transfer or revoke shares. But the document was nonetheless not furnished to him.

PW1 went on to testify that he engaged the services of a Mr. Kiarie advocate to pursue the transfer of the shares. The said advocate wrote demand letters to the directors dated 13th March, and 21st March, 2001 but were not heeded to. He even furnished the Defendant company with an affidavit from the seller confirming that indeed he had sold the shares to him, but the directors still did nothing.

He testified that after the promulgation of the new constitution, he decided to seek refuge in the courts of law. He began by filing a suit in the Magistrate's court in which that court ruled that it had no jurisdiction to entertain a matter on a public company.

PW1 asked the court to ensure that the shares are transferred to him. He also requested that the Defendant be ordered to pay him all accruing dividends since 1979 when he bought the said shares. He further requested that the Defendant furnish him with a certified copy of the Memorandum and Articles of Association of the company.

PW1 also stated that he paid to the vice chairman of the defendant company the sum of Ksh. 80,000/= for purchase of a total of 160 shares. He stated that these shares were revoked and urged the court to compel the Defendant to reinstate them. In this respect, he wants the court to order that the Defendant furnishes him with the company's register of the year 1979.

Finally, PW1 urged the court to order the Defendant to pay him damages accruing from the mental torture he has undergone in pursuit of his shares. He indicated he would rely on the documents annexed to the plaint.

In cross-examination, PW1 stated that he knew that Johnson Rop had three wives and two brothers. He stated that he was also aware that some of the shares he bought belonged to the father of John Rop who was deceased.

He stated that, as a shareholder, he owned 39 shares. Out of 199 shares he previously owned, 160 were revoked. He indicated that the company already refunded him Ksh. 80,000/= which he had paid for the purchase of some shares.

He also stated that he was requested by the Defendant to furnish it with the sale agreement and that he had not yet filled the share transfer form.

PW1 did also concede that the sale agreement dated 12th October, 2001 indicated that he had bought the shares from Sirgoi Holdings Ltd and that the said shares formerly belonged to one Kiptisia Arap Rop (deceased) and Johnson Kipkerich Rop.

He also conceded that he knew that Johnson Rop had no legal authority to transfer the shares of his deceased father.

The defence also called one witness (DW1) one Henry Kipkemboi Tireito the treasurer and a director of the Defendant company. He testified that PW1 was a shareholder of the Defendant company wherein he owns 39 shares. He also stated that Johnson Kipkerich Rop owns 3 shares whereas Kiptisia Arap Rop owned 5 shares. The latter is deceased.

DW1 testified that he was aware that Johnson Kipkerich had sold his shares to the Plaintiff. That although the sale agreement indicated that he had sold 8 shares, he had no capacity to sell that number of shares as he only owned 3. He also had no capacity to sell his father's shares as he had not obtained Grant of Letters of Administration of the estate of his deceased father. In any case, the deceased was still survived by his wife and other children.

DW1 testified that for the foregoing reasons it is not possible to transfer the shares indicated in the sale agreement.

DW1 also testified that the Plaintiff had filed a similar suit in the Magistrate's Court being **ELDORET CHIEF MAGISTRATE'S CIVIL CASE NO. 564 OF 2011**. The same was dismissed with costs.

In cross examination, DW1 denied that the suit in the Magistrate's court was dismissed for want of jurisdiction. He denied that on 15th December, 2012 the directors resolved to expel him from the company because he had sued it. He denied telling the Chief that Johnson had the capacity to transfer all the 8 shares to PW1. He stated that where the shares are owned by a deceased person, the buyer must present to the company a Grant of Letters of Administration alongside the formal transfer of shares form. He stated that Johnson owned his shares separately from his father. He stated that dividends are paid monthly and those of the Plaintiff are sent to his lawyer, Kamau Lagat.

DW1 showed the Plaintiff his share certificate which showed that he only owned 39 shares.

In re-examination, DW1 stated that he was a witness in the Magistrate's court suit.

Parties further filed written submissions which I have considered and will give reference to where need be.

I now formulate the issues for determination to be;

- (a) Whether the Plaintiff validly bought eight (8) shares from one Johnson Rop.
- (b) Whether the Plaintiff satisfied all the requirements needed to facilitate the transfer of the eight shares to him.
- (c) Whether he is entitled to a reinstatement of 160 shares.
- (d) Whether he is entitled to damages for mental anguish.

As to whether the Plaintiff validly purchased the eight shares, he annexed a copy of the sale agreement between himself and one Johnson Kipkerich Rop to the bundle of the documents he relied on in his case. The agreement is dated 23rd December, 2000. The existence of this sale agreement was not denied by the Defendant.

Under paragraph one, it stipulates that the Plaintiff was buying the shares from which belonged to "Mr.

Kiptisia Arap Rop deceased and his son Johnson Kipkerich Rop respectively.”

Although the word '*respectively*' is used in the agreement, the agreement itself did not distinguish what number of shares among the eight belonged to either Kiptisia Arap Rop or Johnson Kipkerich Rop. The evidence of the Plaintiff in cross-examination and that of DW1 revealed that Johnson Kipkerich rop only owned 3 shares whilst Kiptisia Arap Rop owned 5 shares. Therefore the agreement having not distinguished which party owned what number of shares and who was selling what number of shares, then the Defendant could not transfer the 8 shares altogether to the Plaintiff. This is particularly giving regard to the fact that the deceased, Kiptisia Arap Rop was not a party to the agreement.

That aside, the vendor in the agreement is a son of the deceased Kiptisia Arap Rop. By the time the agreement was entered, the deceased was already dead. The law provides that no person can administer the estate of a deceased unless he has obtained Grant of Letters of Administration. And where the estate of a deceased requires to be transferred, the administrator must obtain confirmed Grant of Letters of Administration. The Plaintiff conceded he was seized of this fact. By the time he entered into the sale agreement with the vendor, he had obtained neither of the two legal documents. Ultimately, he had no capacity to purport to sell the shares of his deceased father or have them transferred into his name. Besides, he is not the only heir of the deceased. And so consent from other heirs required to be furnished to the Defendant as evidence that they had no objection to the vendor transferring the deceased's shares to himself.

The above notwithstanding, under Section 77 of the Companies Act, Cap 486, Laws of Kenya, for the Defendant to transfer the shares, the Plaintiff was required to sign a prescribed instrument (form). The said provision reads;

“Notwithstanding anything in the Articles of the company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company.

Provided that nothing in this section shall prejudice any power of the company to register as a shareholder or debenture holder or any person to whom the right to any of the company has been terminated by operation of the law.”

In his evidence in chief, the Plaintiff testified that he had indeed delivered a duly executed transfer form to the directors of the Defendant company who declined to effect the transfer.

But in cross examination, he contradicted himself by indicating that he had not delivered such a form. Therefore, even if he had obtained the Grant of Letters of Administration, having not executed the prescribed legal instrument as provided by Section 77 of the Companies Act, the Defendant would nevertheless not have transferred the said shares.

However though, the current position is that the Plaintiff has not satisfied the aforementioned legal conditions to warrant him to claim that he validly purchased the 8 acres and that the Defendant had refused without any justification to transfer them to him.

The second issue has been adequately addressed in the first issue.

On the third issue – whether he is entitled to a reinstatement of 160 shares, he alluded to having purchased the said 160 shares at a cost of Ksh. 80,000/=. He testified that he gave the said sum of money to a director of the Defendant company. He did not name he director to whom he gave the money. However, on cross-examination, he conceded that he got a refund of the entire sum of Ksh. 80,000/=. He testified as follows:-

“I gave the Vice-Chairman of the company Ksh. 80,000/= for purchase of 160 shares. He should be asked to testify.”

In cross-examination, he stated as follows;

“I am a shareholder of Sirgoi Holdings Ltd. I own 39 shares as 160 out of 199 were revoked.”

He thereafter added;

“The company refunded Ksh. 80,000/=. I had bought shares with the money.”

So what further refund did he require? And how could the Defendant reinstate shares for which refund of the purchase price was given to him? Clearly, the Plaintiff wants to reap where he has not sowed. That is being dishonest and this court castigates him for not being honest to himself and the court.

Let me note that although the prayer for reinstatement of the shares was not sought, it was important that I addressed it as it was raised in the evidence.

As regards payment of damages, for mental anguish while pursuing the transfer of the shares, it is a prayer that ought to have been substantively pleaded. The same was not pleaded and besides, no tangible evidence was led in prove of that assertion. As such, I find the issue as being improperly prayed for. Furthermore, the Plaintiff having failed to prove that the Defendant had declined to transfer to him any shares, the prayer for damages would not hold.

Finally, the Defendant claimed that this suit is Res Judicata, a similar claim having been filed vide **ELDORET CMCC. NO. 564 OF 2011 – WILLIAM ZULU MATELONG -VS- SIRGOI HOLDINGS**. The Defendant contended that this suit was heard to its logical conclusion and dismissed with costs. The Plaintiff on the other hand contended that the suit was only struck out for want of jurisdiction by the Magistrate's court.

The law is trite, that *“he who alleges must prove”*. No pleadings were produced in court as exhibits relating to the said Eldoret CMCC. No. 564 of 2011. Neither was a Judgment nor a decree exhibited. This court has no prove that such a suit existed. With due respect, the defence led the evidence in this respect in a very casual manner. More needed to be done if the court were to seriously look into that averment. I dismiss it as lacking in merit.

In the end, I find that the Plaintiff has totally failed to prove his case on a balance of probabilities. The same is hereby dismissed with costs.

DATED and DELIVERED at ELDORET this 13th day of November, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Plaintiff present in person

Mr. Maritim Advocate for the Defendant