



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 119 of 1994

NYACHIRO SIRIBA PLAINTIFF

VERSUS

OCHWARI MOGAKA 1ST DEFENDANT

GORI KIBINDORI 2ND DEFENDANT

ABANCHANI FARMERS CO. LTD. 3RD DEFENDANT

JUDGMENT

1. By an amended plaint dated 10th November and filed on 11th November 2004 the plaintiff prays for judgment against the defendants jointly and severally for:-

(a) A declaration that the 1st Defendant is holding 6 acres comprised in L.R.NO. NYAMIRA/NYANKONO/33 in trust for the plaintiff.

(b) The trust be now terminated by transfer of the said 6 acres in the names of the plaintiff by first Defendant and in default the Executive Officer of this court to execute a transfer on his behalf.

(c) Costs of this suit.

2. The plaintiff claims to have become a fully paid up member and shareholder of the 3rd Defendant Abanchani Farmers Co. Ltd. in or about 1996 after paying Kshs.10,000/= as his capital contribution and thus becoming one of the 32 original share holders of the said company. He avers that the 3rd Defendant being a land buying company bought land which it shared amongst its shareholders on a pro-rata basis and the plaintiff was allocated plot NO.5 NYANKONO FARM measuring 23 acres. That in or about 1969, 1st and 2nd Defendants entered into the plaintiff's said plot and occupied a portion thereof measuring 2 acres but as they were not bona fide shareholders of the company they were chased away by the 3rd defendant. the plaintiff also avers that in collusion with one another the Defendants fraudulently registered the 6 acres of land comprised in the said plot NO.5 belonging to the plaintiff in the 1st Defendant's name as L.R. NO. NYAMIRA/NYANKONO/53.

3. The plaintiff has set out particulars of fraud in against the defendants herein jointly and severally as detailed in paragraph 7A of the amended plaint, to the effect that the defendants failed to inform Nyamira District Land Registrar that the 1st and 2nd Defendants were to share equally 11 acres as was decreed in

Kisii HCCC No.80 of 1973 and further that the defendants failed to inform the Land Registrar that the plaintiff and the 1st defendant were to share 23 acres in accordance with the resolutions of the company governing shadow members.

4. In their defence the 1st and 2nd defendants have denied that the plaintiff bought a share from the 3rd Defendant as alleged and puts him to strict proof thereof. They aver that they are the ones who bought the shares but the 2nd Defendant is the one who invited the plaintiff as his brother to join him in purchase of the 2nd defendant's share and hence at the time of sharing the land, it was the second defendant who would share with the plaintiff ½ of his entitlement which is 11½ acres which would also depend on the contribution each gave towards the purchase of their share.

5. While they agree that each member was to receive 23 acres the 1st and 2nd defendants aver that as for the share where plaintiff and 2nd and 3rd defendants were involved all the three were to get only 23 acres because they had jointly bought only 1 share. They deny collusion but aver that they are lawfully claiming their rightful share in 23 acres they were jointly allotted together with the plaintiff.

6. According to the 1st and 2nd defendants, the plaintiff is not the sole allottee of the alleged one share and therefore he is not entitled to the prayers sought in the plaint. They have requested that the suit be dismissed with costs.

7. On the 11th June 2007 the suit was withdrawn as against the 3rd defendant and the plaintiff proceeded to give his testimony as PW1.

8. The plaintiff states that he acquired shares in Abanchani Farmers Company and was allocated plot No.5 comprised of 23 acres being a temporary allocation pending survey. He built on that parcel of land, and took his wife and father to see it in or about the year 1969. In the same year his brother came and offered to assist his mother clear the land as he the plaintiff was away from home then. He had not authorized the brother (2nd defendant) to move into the said parcel of land. When the company requested for more money he requested the 2nd defendant to help him raise the money. His brother got the money from the 1st defendant but he did not bring it to him (the plaintiff). He then told the 2nd defendant to vacate the land but the 2nd defendant declined. He produced receipt **Ex.P1** which read Nyachiro Siriba and Onchwari which he claims to have disputed and he wrote to the company through his advocates because he claims to be the one who had made the payment. He claims that the receipt book was not available at the time he made the payments to the company.

9. That when the plaintiff complained about the issuance of the payment receipt in joint names with his brother, he was referred to the director one William Buruchara. He instructed his advocates to handle the matter vide a letter dated 7th March 1979 produced as **Ex. P2**. He states that the 1st Defendant paid his contributions directly to the company. Despite all the above the 2nd defendant has taken possession of his plot No.5.

10. The plaintiff also states that after complaining to the company the defendants were removed and Onchwari the 1st defendant sued the 2nd defendant and the company vide **HCCC NO.80 of 1973 Kisii**. The court then decided that the 2nd defendant and the 1st defendant would be registered as joint proprietors. The 1st defendant has produced the proceedings in the said case as exhibit in this case.

11. When the company finally obtained consent to sub-divide the said land amongst the share holders it was resolved that the plaintiff be allocated 11 acres being the main shareholder while the 1st defendant would be jointly allocated 11 acres because they had been contributing directly and separately to the company.

12. Although he (the plaintiff) did not attend the company's board meeting the 1st defendant's name and his were forwarded to the land board. He has produced the application form **MF1D4** where his name

appears as No.27 with that of the 1st Defendant. He claims that the decision in **HCCC NO.80 of 1972** was not adhered to and plot No.5 was then registered as No.52. The first defendant's parcel was registered as No.53. He has produced a copy of the register in the name of the 1st Defendant comprising 4.452 hectares of which he claims ownership. He has produced a copy of the green card as **Exhibit P5**. The plaintiff prays for an order transferring the 6 acres to himself. The plaintiff did not call any witnesses.

13. In his defence DW1, the 1st defendant Onchwari Mogaka testified that he partnered with the 2nd defendant to buy the land jointly registered as Nyankono/53, as per a copy of the title deed produced as **D. Exhibit 1**. He says that the land was bought from Abanchani Farmers Co-operative Society. The title deed is in his name issued on 16th November 1999 covering 11 acres. He further claimed that the 2nd defendant also had 11 acres which he was to sub divide with the plaintiff. The said land was bought in 1967 but they settled there in 1972. They had a dispute with the 2nd Defendant vide **Kisii HCCC NO.80 of 1973** where it was ordered that they be registered as joint proprietors of the land which had not been subdivided but was later subdivided and each of them allocated 11 acres. A copy of the court order has been produced **D. Exhibit 2**. When they were doing the case **HCCC NO.80 of 1973** the plaintiff was a child and it was therefore not true that the land they bought was his; he states that it is also not true that he (1st defendant) was to share his land with the 2nd defendant as alleged by the plaintiff. DW1 denied that the subdivision was not done fraudulently. He also denied that he bought the land jointly with the plaintiff. He requests this court to dismiss the plaintiff's case.

14. On his part the 2nd defendant Gori Kibondori, DW2, testified that the plaintiff is his brother. He says that he was a member of Abanchani Farmers Company Limited where he started contributing. On realizing that he would be unable to keep on contributing, he invited the 1st defendant to partner with him in contributing to the company. He claims that the plaintiff did not have any share in the company and was instead living on the ancestral land at Kiabonyoru. There was a problem between him and the 1st defendant wherein he was sued and the 1st defendant won the case and he (2nd defendant) accommodated the 1st defendant on the land which he had been occupying. This was before the land was sub divided between them. Later the land was subdivided and at that time of subdivision, the plaintiff was living on the land between the two defendants. His name (2nd defendant) appear on the list of shareholders of Abanchani farmers Company Limited so does the name of the 1st defendant. The 2nd defendant said he did not know whether the plaintiff's name appeared as a shareholder of the company. He claims that the plaintiff was given his own parcel of land by the surveyors, although he could not say how big the land was. The 2nd defendant also testified that he had not collected his title deed.

15. The defence called one witness being DW3 PASTOR WILLIAM BAIGARA who testified that he knew the plaintiff and the 1st and 2nd defendants. He confirmed that they were members of Abanchani Farmers Company Limited. He was a director of the said company amongst 5 directors 3 of whom were now deceased and the other was sick and residing in the U.S.A. Mr. Zedekiah Keengwe (deceased) was the secretary. The company was wound up. He testified further that the 1st and 2nd defendants had joint shares but the 2nd defendant had wanted to chase away the 1st defendant but the court ordered that they should each get a half of the land represented by the share that they jointly held. The company was notified about the court's decision. Thereafter a surveyor came and the land was divided into 3 equal shares and each got 11.5 acres but the 2nd defendant went ahead and divided his share with his brother the plaintiff. Each developed their portion of land. He also claims that the plaintiff was not a member of the company but was given a share of the land by his brother the 2nd defendant.

16. I have carefully gone through the court records, the plaint, defence and the submissions by the parties herein. I have also gone through the proceedings and in my humble view, the following are the questions and/or issues that arise for determination:-

1) *Whether the parties herein were share holders of Abanchani Farmers Company Limited.*

- 2) *How many shares did each of them hold/own?*
- 3) *Whether they were entitled to a portion of the 700 acres held by the company.*
- 4) *How was their share of land divided and did the 1st defendant hold his land in trust for the plaintiff.*
- 5) *If so in (4) above the said trust be now terminated by transfer of the said 6 acres in the names of the plaintiff by the 1st defendant and in default the executive officer to execute a transfer on his behalf.*

17. In answer to the first issue, all the parties herein were share holders in Abanchani Farmers Company Limited. This is brought out clearly by their testimonies where the 2nd defendant states that he was a contributor but when he encountered difficulties in contributing further monies, he brought the 1st defendant on board to assist him. This made the 1st defendant a shareholder as he also contributed. From DW3's testimony the plaintiff also became a member of the company, though it is not very clear how he contributed although he produced a receipt being **P. Exhibit 1** with the names of all parties herein having contributed. The receipt was for Kshs.4,000/=.

18. On the second issues it has come out clearly that the 1 share was owned jointly by all the parties herein so the fact in issue is whether the 1 share was owned jointly by the plaintiff and 1st and 2nd defendant. There were no records produced to prove that the parties herein were contributors and/or members of the Abanchani Farmers Company Limited which makes it difficult to point out precisely who are the members, and what their actual shares were or may have been.

19. Being shareholders therefore the parties herein were entitled to a portion of the land owned by Abanchani Company Limited. It has come out clear that each share entitled one to 23 acres of the land.

20. This being the case the parties herein were entitled to 23 acres which was owned jointly and as per the judgment in **HCCC No.80 of 1973**. The said parcel of land was to be divided equally between the joint owners who happened to be the 1st and 2nd defendants. No one appealed against that decision to share out the 23 acres equally.

21. The 2nd defendant told the court that he brought the plaintiff on board and gave him ½ of his 11 acres as their ancestral land was small and could not accommodate them. This the plaintiff has not challenged but he only claims that the whole 23 acres belonged to him. It was unfortunate that no records were produced in court to give the court a clear picture of the goings on at the Abanchani Farmers Company Limited during the purchase and subdivision of the 700 acres which were to be shared out among shareholders.

22. Looking at the evidence as a whole, the 1st defendant has shown that he is the proprietor of Nyankono/53 and he produced the title deed of the same showing that he owns 11 acres thereof. The title is in his name and it is not shown thereon nor proved that the same is being held in trust for anyone else. So the contention by the plaintiff that the 6 acres out of the said parcel of land belong to him has no basis.

23. Finally having said that there is no trust between the 1st defendant and the plaintiff, the same cannot be terminated as it does not exist and no transfer can be effected in favour of the plaintiff.

24. The plaintiff's suit therefore fails in its entirety. The same is dismissed with costs to the 1st and 2nd defendants.

Dated and delivered at Kisii this 09th day of May, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of

Mr. Miencha h/b for N. Migiro for Plaintiff

Mr. Soire for 1st Defendant

Mr. Soire for 2nd Defendant

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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