REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

(CORAM: GICHERU, TUNOI & LAKHA, JJ.A.)
CIVIL APPEAL NO. 112 OF 1996

BETWEEN

STEPHEN BOWEN ..... APPELLANT

AND

GILBERT MURAGURI .....RESPONDENT

(Being an appeal from the judgment of the High Court of
Kenya at Nakuru (Justice Lady R. N. Nambuye) dated
the 25th April, 1994 and delivered on 10th May, 1994
in
NAKURU H.C.C.C. NO. 127 OF 1992
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JUDGMENT OF THE COURT

This litigation has a long history, but, it is necessary for the proper determination of this appeal to set out in full the facts giving rise to the suit. The appellant and the respondent are both shareholders of Kalenjin Enterprises Limited ("the company"), a company incorporated in Kenya and based in Nakuru. It was incorporated soon after Independence and its main concern was to purchase land from former colonial settlers with a view to settling its shareholders. The parcels of land in dispute are in the company's farms situate at Miti Mingi, Mbaruk in Nakuru District. The appellant, the original defendant in the suit, became a shareholder of the company in 1969 by purchasing 65 shares. In 1972 the company allocated him a small plot to reside on temporarily. He was instructed not to erect any permanent structures as there was a possibility of him being shifted therefrom when eventual resettlement of shareholders would be undertaken.However, nothing of significance occurred until on March 2, 1979, when the respondent, the original Plaintiff in the suit, bought 25 shares in the company from one Mariko Toroitich. It is worthy of note that the directors of the company consented to the transfer of shares in favour of the respondent by entering his name in its register and by issuing him with a share certificate. The respondent also acquired physical possession of the parcel of land and houses formerly owned by Mariko Toroitich and thus became the appellant's most immediate neighbour because their respective plots shared a common boundary.

Despite warning by the company it would appear that both the appellant and the respondent intensively developed their respective plots and had, amongst other developments, erected permanent houses thereon.

In or about 1987 the company carried out a survey of its farms and demarcated them into various

parcels of land, one of which parcel is registered as Miti Mingi/Mbaruk Block 3/1010 (Barut), the subject matter of this suit, hereinafter referred to as the suit land. It later transpired, however, that the suit land comprised of all the developments, houses included, of both the appellant and the respondent. It is not in dispute that the company's allocation committee allocated the entire suit land to the appellant.

The effect of that allocation was that the respondent would forfeit his permanent house and other developments to the appellant. The respondent did not, naturally, accept that decision and lodged an appeal against it before the appeals committee whose chairman was the Nakuru District Commissioner. The appeal so lodged was numbered Appeal Case No. 9 of 1989. The decision of that committee deserves to be set out in extenso:

" The District Commissioner

P. O. Box 81

NAKURU

22nd November, 1989

Stephen Bowen

P. O. Box 2877

NAKURU.

APPEAL CASE NO. 9 OF 1989

YOURSELF VS GILBERT MURAGURI

The Appeals Committee sat on the 20th November, 1989 and passed judgment on the above named case. It was resolved that each party shall retain his house together with one share.

Mr. Gilbert Muraguri consented to retain 1.5 acres instead of the usual 1.8 acres since it was not possible for the surveyor to fit in all his portion of land considering the proximity of the two homes constructed. As such Mr. Gilbert Muraguri will retain plot No. 1010 comprising 1.5 acres, whereas you shall retain plot No. 1011 measuring 2.1 acres. The balance of 1.8 will be allocated to you in due course.

Take notice that you are now instructed to ensure that Gilbert Muraguri is given access to his house with effect from this letter. You are ordered to remove the fence that has entirely enclosed the homestead of Gilbert Muraguri to enable him have access of way. Should you not have removed this fence within 21 days of receiving this letter, drastic action shall be instigated against you without resorting the matter to you.

A. A. KALUME

FOR: DISTRICT COMMISSIONER

NAKURU DISTRICT.

c.c.

Gilbert Muraguri

P. O. Box 1492

NAKURU"

Against that decision the appellant instituted an application, Nairobi High Court Miscellaneous Civil Application No. 187 of 1990, for Orders of certiorari and prohibition directed against the decision of the District Commissioner, Nakuru. It is common knowledge now that after the appellant collected the title deed for the suit land from the local Land Registry on August 27, 1991, he abandoned the application.

By plaint dated March 2, 1992, the respondent averred that the appellant, despite the decision of the appeals committee, had fraudulently proceeded to obtain in his name (appellant's) the title deed for the suit land without disclosing the interest of the respondent over the suit land. Particulars of fraud were set out in the plaint and the prayers sought were:

> a)A declaration that Plot No. 1010 now registered as Miti Mingi/Mbaruk Block 3/1010 (Barut) measuring 0.59 ha. belongs to the respondent and the appellant holds title fraudulently.
>
> b)An Order for rectification of the register of Miti Mingi/Mbaruk Block 3/1010 (Barut) by substituting the name of the appellant with that of the respondent.
>
> c)An injunction against the appellant from disposing alienating entering or in any manner interfering with the respondent in his quiet enjoyment and user of the subject matter of the suit.

The appellant traversed the allegations in the plaint and contended in the main that the respondent was not allocated the suit land by the company's allocation committee and that the reference of the dispute to the District Commissioner for arbitration was not sanctioned by law and, therefore, whatever decision he made was not binding on the parties to the dispute.

In her judgment, the learned trial judge made three fundamental findings; first, that though the company had established an allocation committee, the affairs of the company were being run by a commission under the chairmanship of the District Commissioner, Nakuru, and when there arose many complaints against the decisions of the allocation committee, the District Commissioner set up an appeals committee whose purpose was to ensure that redress could be obtained by correcting wrong decisions by the company's allocation committee (The appeals committee quashed the decision of the company's allocation committee); secondly, that it had not been shown that the District Commissioner acted without authority and, finally, that the decision of the appeals committee was fair and just in the circumstances of the case.

It was urged upon us by Mr. Maraga for the appellant that the learned judge erred in assuming that the District Commissioner, Nakuru, in his administrative capacity had powers to interfere with the affairs of a limited liability company in the allocation of the suit land by the company to the appellant when he was not legally authorised so to do. Outwardly, this argument sounds attractive. But, what is the position on the ground in the particular circumstances of this case? It is not in dispute that the company's farm had been utterly mismanaged and a commission whose chairman was the District Commissioner, Nakuru, had been formed to oversee its affairs. The company's plot allocation committee comprised of 15 members. The District Commissioner, too, was a member of this committee. He supervised the allocation and registration. He was the Chairman of the appeals committee which he had set up. He moved the Land Registrar to open the Register on August 9, 1991, after giving the latter the particulars of the names of the allottees who eventually were issued with Title Deeds. The appellant, and indeed; all other shareholders never raised any objection to the District Commissioner sitting in any of the company's committees.No one either objected to the setting up specifically of the appeals committee. It is plainly clear that the District Commissioner was an active participant in both the company's plot allocation and appeals comittee and was instrumental in the issuance of the title deeds for the allottees.

The appellant stood by for so long and cannot now question the legality of the membership of the District Commissioner in the two committees, for to do so now would be to prejudice the rights of the respondent. The appellant had a duty to protest at the initial stages if he knew that the District

Commissioner was acting on an erroneous assumption of authority. In our view, having regard to the material before the trial court we are satisfied that the learned judge correctly resolved this issue and her finding cannot be faulted.

It appears that there were numerous complaints as regards allocation of plots by the company. The importance of the availability of the appeals committee to ensure that redress could be obtained for mistakes by that committee cannot be minimised. In this instance, there were not less than nine appeals resolved by the appeals committee. The volume of the appeals, no doubt, shows that there were some shareholders who had grounds for dissatisfaction with the outcome of the allocations. We do not see how the learned judge erred in finding that there was such a committee which heard and reversed the decision of the allocation committee in view of plain documentary evidence presented before her.

The parties to this appeal had effected intensive development on their portions of the land they occupied before re-allocation. Each of them had erected thereon a permanent dwelling house. None of them was willing to be translocated. The decision of the appeals committee was that each person was to retain the portion of the suit land on which he had constructed his house and seek compensation elsewhere within the farm for the shortfall. It was further confirmed that land was available for them for this purpose. In our view, this was an equitable, fair and just decision in the circumstances for, if the decision of the allocation committee stood, the respondent would have been deprived of his property by the appellant who had not indicated and was not forthright whether or not he was ready to offer compensation. No greater injustice than this would have been occasioned to the respondent and no court of law would countenance it.

The learned judge, in our view, arrived at a correct decision on the evidence tendered before her and it would not be right for us to interfere with her judgment. That being our view of the matter our judgment shall be that this appeal must be dismissed with costs.

Dated and delivered at Nairobi this 24th day of April, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR