



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO.120 OF 2012

ALEX RIOBA ROBOSO.....PLAINTIFF

VERSUS

TUWAN FARM LIMITED.....1ST DEFENDANT

TOM ALEX RIOBA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a plaint dated **18/9/2012** and filed on **19/9/2012**, the plaintiff sought the following orders against the defendants:-

a. A declaration that the process of transfer and registration of title number Kitale Municipality Block 2/Tuwan/2298 and 2299 respectively in favour of the 2nd defendant at the instance of the 1st defendant is illegal, null and void and the 2nd defendant do surrender the original title documents for cancellation by the District Land Registrar and that the District Land Registrar Trans-Nzoia County do register the plaintiff as the sole proprietor of the said plots number 2298 and 2299.

b. A permanent injunction do issue restraining the defendants by themselves, their servants, agents or by someone acting on their behalf or authority from trespassing onto, demarcating, disposing of, developing, fencing of, evicting the plaintiff therefrom, laying claim thereto or in any other manner interfering with the plaintiff's peaceful and quiet occupation of the suit plot.

c. Costs of this suit

PLEADINGS

The Plaintiff

2. In the plaint, the plaintiff states that the 1st defendant issued him with a shares membership certificate number 519 showing that he is a member of what is known as the **Tuwan Farm Urban Project** and that he is the owner of plots numbers **2298, 2299, 2300 and 2301**; that he paid the requisite fees to facilitate issuance of title; that later he discovered that the 1st defendant had fraudulently executed a transfer and thus caused the 2nd defendant to be registered as the as the proprietor of plots numbers **2298 and 2299**.

The 2nd Defendant's Defence and Counterclaim

3. The 2nd defendant filed defence and counterclaim dated **23/10/2012** on **25/10/2012**. He denied the claim and stated that the plaintiff was allocated different plots which he has already disposed of and accused the plaintiff of fraud. He alleged that the plaintiff surreptitiously obtained a share certificate for the suit land without regard for the 2nd defendant's ownership of the land. in the counterclaim he stated that the land is registered in his name; that he is lawfully in possession thereof since the year 2000; that the plaintiff has been damaging or wasting the suit land thus occasioning him loss and damage. Seeks a declaration that he is entitled to exclusive right of possession and occupation of the suit land which the plaintiff is wrongfully in possession of, vacant possession, general damages for trespass and costs.

The 1st Defendant's Defence

4. The 1st defendant filed its defence on **13/11/2012**. It denies the plaintiff's claim and stated that it does not have any relation with the Tuwan Farm Urban Project; that the plaintiff was allocated only plots numbers **2300 and 2301** which he disposed of to one **John Maina**

Kamau; it denied claims of fraud and avers that the plaintiff has no interest in plots numbers **2298** and **2299** and his occupation is thus unlawful; that the said plots were regularly transferred to the 2nd defendant by its officials; that the plaintiff is guilty of fraud in that he used a ruse to obtain a membership share certificate including the said plots from an entity different from the 1st defendant.

Reply to 2nd Defendant's Defence and Counterclaim

5. The plaintiff filed a reply to 1st defendant's defence and counterclaim on **27/11/2012** and a reply to 1st defendant's defence on **27/11/2012** denying the allegations in those two pleadings.

The Plaintiff's Evidence

6. The plaintiff testified on 18/6/2013. His evidence accorded with the plaintiff. He stated that he became a member of Tuwan Farm in **1987** and that he purchased two plots measuring **52.5 feet by 105 feet** at **Tuwan Farm** in that year; that the company later changed its name to **Tuwan Farm Urban Project**; that he was issued with a membership number **519** and certificate number **847**; that the certificate shows he is the owner of four plots; that he had bought two plots but during registration he was given four; that the share certificate was signed by the officials of the company and a company stamp was affixed thereon; that he took possession built and has been staying on the land. Later the chairman of the company wrote confirming that he was the owner of the plots. He later sold plots numbers 2300 and 2301 and retained plots numbers 2298 and 2299. That the matter went before the chief and before the police; that a search was made which revealed the 2nd defendant as the registered owner hence this suit.

7. As he continued with his evidence the plaintiff stated that he bought his two plots from a member of Tuwan Farm in 1987 but that he has since lost the agreement between them as well as other documents. He added that the 2nd defendant began claiming the land only recently.

8. On cross examination he averred that he bought the plots from **Joseph Cheruiyot**, that he sold two plots to **Kamau**; he averred that he was not given a police abstract for his lost documents and that the police abstract receipt was lost during the post-election violence. He has not processed title deeds for the suit land;

The Defence Case

9. The 2nd defendant testified on **10/4/2018**. His evidence is that he took a loan and bought the land from **John Cheruiyot** in **1987** and he was given a certificate of membership and he put agents on the land who left later on unspecified dates; however, when he came to inspect his plots in the year 2011 he found that the plaintiff had encroached on his plots situate in Tuwan Farm. He produced his certificates of membership in the farm. According to him, both the plaintiff and the 2nd defendant are registered in the company records and the plaintiff is his neighbour; on the register the 2nd defendant owns plots numbers 2298 and 2299 and the plaintiff owned plots numbers 2300 and 2301 the latter plots which the plaintiff sold to one John Maina Kamau. The 2nd defendant paid survey fees for the two plots on 13/6/2009 and he obtained title in 2011; he denied committing any fraud.

10. DW2, Bruce Mwalali testified on **25/9/2018** and adopted his statement filed in court on the **13/11/2012**. His evidence is that he is a director of Tuwan Farm Ltd since **1998** to the date of his statement; that he remembered that at one time in the year 2000 the plaintiff came to the company office bearing a letter from the area assistant chief showing items allegedly lost; that the plaintiff informed the directors that the items pertaining to his plots were misplaced; that they assisted him albeit with a caveat that the registers would still be looked into to verify which plots he bought and which were allocated to him upon survey; that two days after that visit the directors realized that the plaintiff had furnished them with the wrong information, in that that information related to the 2nd defendant's plots; that according to the company records the plaintiff and the 2nd defendant were neighbours and plots 2298 and 2299 belonged to the 2nd defendant while plots no 2300 and 2301 belonged to the plaintiff; that upon this discovery the plaintiff was asked to come back to the office with all the new documents which he had been issued with but in vain; that thereafter the company transferred the land to the 2nd defendant. Upon cross examination he stated that the company was registered in 1966 and then re-registered in 2011. Upon the first registration no share certificates were issued to any member; that share certificates were issued first in 1992 after the land was subdivided. He admitted signing the plaintiff's certificate in respect of the suit land but asserted that the same was soon thereafter recalled upon discovery that the plaintiff had misled the directors and obtained documents to the 2nd defendant's land. When the incident was reported to the chief, the plaintiff was summoned and he refused to appear. Upon examination by the court the witness stated that the plaintiff and the defendant purchased their respective parcels from the same seller, Joseph Cheruiyot;

11. He explained the process of obtaining a share certificate to be as follows: one should visit the treasurer and pay Ksh 500/=; then get the share from the booklet; thereafter the owner's names and identity card number were typed into the certificate at the typing pool; that

Submissions

12. The plaintiff filed his submissions on **8/11/2018**. The 2nd defendant's submissions were filed on **1/11/2018**. I have perused through the court record and found that no submissions on behalf of the 1st defendant were filed. I have considered the pleadings, the evidence and the filed submissions. The issues that arise in this suit are as follows: -

(1) Who is the proper allottee of the suit land?

(2) What orders should issue?

Who is the proper allottee of the suit land?

13. The undisputed facts that emerge from the evidence are as follows: that in 2000 the plaintiff reported his documents in respect of land to be lost whereupon he was asked for details pertaining to his land and which he gave; that on the basis of these details the plaintiff obtained fresh documents being **PExh 1** and **PExh 2** being a share certificate and a letter dated 18/7/2000; that the details he gave to the company directors of the 1st defendant were inserted into the share certificate (**PExh 1**); that later on there were attempts to get the plaintiff to surrender the documents **PExh 1** and **2**; that he refused to surrender the documents even after he was reported to the chief and he continued using the suit land despite being informed that it belonged to the 2nd defendant.

14. I find candour exhibited here in that **DW2**, the director of the company did not deny that they issued those documents produced by the plaintiff; he admitted it and said that it was in error and pursuant to misrepresentation from the plaintiff, which error the directors tried to correct by having the plaintiff surrender **PExh 1** and **2** in vain.

15. The plaintiff never produced the documents that he obtained in the year 1987 in respect of the suit land. In contrast to his oral evidence, his share certificate no 847 is dated 18th July 2000. His **PExh 6** does not list the share certificate as one of the items that were alleged to be lost.

16. The plaintiff never produced any plots certificates or copies thereof in respect of the suit land. The 2nd defendant produced copies of his plot certificates.

17. On the other hand **DW2** affirmed that the 2nd defendant is, according to company records the true owner of the suit land and that when the plaintiff refused to surrender the documents he was issued in the year 2000, the company proceeded to transfer the suit land to the 2nd defendant.

18. The 2nd defendant produced an original of an agreement dated 30/7/1987 vide which he states he purchased the suit land from one Joseph Cheruiyot. The same is acknowledged by the 1st defendant by the affixing thereon of its official stamp.

19. The plaintiff is said to own the plots that follow the 2nd defendant's plots in the sequence that is plots numbers 2300 and 2301. The plaintiff admits in cross examination that he sold these plots to one **John Kamau**.

20. According to **DExh 5(a)** which is an extract of the area list for the company land the said **John Kamau** is named as the owner of plots **2300** and **2301**. And the plaintiff as the owner of plots numbers **2298** and **2299**.

21. It is noteworthy that in cross examination by Mr. Ingosi, the plaintiff admitted that that he never obtained a police abstract in respect of his lost documents. The court sympathizes with the plaintiff's misfortune of misplacing documents - including documents in proof of the loss of other documents - but maintains that it would uphold a party's claim only on the basis of solid evidence to avoid doing an injustice to any other party in a suit.

22. Whatever the motive for the transaction that gave the plaintiff possession of **PExh 1** and **PExh 2**, the propriety of that transaction is put into doubt by the renunciation of those documents by the 1st defendant which leaves the plaintiff's claim unclothed with any shred of evidence.

23. I find that of the two main combatants herein, the 2nd defendant has presented stronger evidence in his defence and counterclaim than the plaintiff has in respect of his case. I find no evidence of any fraud on the part of the two defendants.

24. The 2nd defendant is already the registered proprietor of the land. No fraud has been established on his part. I find no ground to disturb his registration as proprietor under the provisions of **Section 25 and 26** of the **Land Registration Act** as his title is sound. He is entitled to all rights to that land as provided for by **Section 24(a) of the Land Registration Act**.

25. Consequently I find that the plaintiff has failed to prove his claim against the defendants on a balance of probabilities and that the 2nd defendant has proved his counterclaim on a balance of probabilities.

What Orders should issue?

26. In the final analysis I enter judgment for the defendants and issue the following orders:

(a) The plaintiff's suit is hereby dismissed with costs;

(b) The 2nd defendant's claim is allowed.

(c) It is hereby declared that the plaintiff is in wrongful occupation of the suit land being Kitale Municipality Block 2/Tuwan /2298 and Kitale Municipality Block 2/Tuwan /2299;

(d) It is hereby declared that the 2nd defendant is entitled to possession of Kitale Municipality Block 2/Tuwan /2298 and Kitale Municipality Block 2/Tuwan /2299;

(e) The plaintiff shall remove his property from and vacate the said Kitale Municipality Block 2/Tuwan /2298 and Kitale Municipality Block 2/Tuwan /2299 in default of which he shall be forcibly evicted.

(f) The plaintiff shall bear the costs of the counterclaim.

Dated, signed and delivered at Kitale on this 29th day of January, 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019