



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 170 OF 2013

JOHN SITUMA BIKETI.....PLAINTIFF

VERSUS

LUMBOKA ESTATES LTD.....1STDEFENDANT

ELIUS KIMUNGUI CHESES.....2NDDEFENDANT

COSMAS WAFULA BARASA.....3RDDEFENDANT

RICHARD KISEMBE MUKWANGACHI.....4THDEFENDANT

FREDRICK BOIT.....5THDEFENDANT

JUDGMENT

1. By a plaint dated **10/12/2013** and filed in court on the same date, the plaintiff sought the following orders against the defendants jointly and severally:-

- (a) A declaration that the plaintiff is entitled to 11.5 acres out of LR. No. 2143/1/5 Cherangani from the 1st defendant.
- (b) An order for eviction of the 2nd to 5th plaintiffs from Plot No. 27 situated on LR. No. 2143/1/5 Cherangani.
- (c) An order directing the District Land Registrar to rectify the boundary between Plot No. 27 and Plot No. 25 and carve out 11.5 acres for the plaintiff.
- (d) Costs of the suit
- (e) Any other relief this court deems fit and just to grant.

The Plaintiff's Case

2. The plaintiff's case is that he is a shareholder of 1st defendant company having paid up his shares as required by the company and that the company purchased **LR. 2143/1/5 Cherangany** within Trans-Nzoia County; that each shareholder was to get land proportionate to the money paid for his shares; that the plaintiff was allocated **Plot No. 27** measuring **11.5** acres and took possession thereof; that the 1st defendant thereafter subdivided **Plot No. 27** between **2005 - 2007** and allocated it to the rest of the defendants who now occupy **10** acres leaving the plaintiff with only **1.5** acres; that the plaintiff had no privity of contract with the 2nd - 5th defendants and they should be evicted from his land. The plaintiff seeks a declaration that he is entitled to **11.5** acres out of **LR 2143/1/5 Cherangany**.

The Defendants' Joint Defence

3. The defendants filed their joint defence dated **12/2/2014**, denying the claim and stating that the plaintiff is a serial litigant who has failed in numerous case against the defendants; that this suit is *res judicata* and establishes no cause of action against the defendants and that they occupy their rightful portions of land. The issue of *res judicata* was ruled upon by this court on **29/7/2015** when it ruled in an application for dismissal of the suit for *res judicata* that there is nothing left from the previous suit which would render the current suit *res judicata*.

The Plaintiff's Evidence

4. The suit came up for hearing on 1/3/2018 when **PW1**, the plaintiff, testified and reiterated the contents of his plaint. He added that each share cost **Kshs.2500/=** and it was equivalent of **1 acre**. He produced an agreement dated 25/11/1985 as **P. Exhibit 2** showing that the company had allowed him to be a member. He stated that pursuant to that handwritten agreement he paid **Kshs.39,680/=** which was receipted vide receipt produced as **P. Exhibit 3(a) - (h)**. He stated that he was given **Plot No. 27**; that he sold **Barasa Wafula 1 acre, Henry Olachi 0.5 acres, Alex Nyongesa 0.1 acres, John Nasila 0.1 acres, Bernard Wanyonyi 0.2 acres**. However he now retains only a half-acre. He argues that if this ½ acre is added to the land he sold the total is 2.7 acres. However he states that had he gotten his rightful entitlement he should be having **11.1 acres** after all the sales mentioned above and he now claims that balance from the defendants. He avers that the 2nd defendant occupies 1 acre, the 3rd defendant occupies 2.2 acres and the 5th defendant occupies 4.7 acres. When shown **D. Exhibit 2** the final area list for the farm he stated correctly that at **No. 27** on that list is **Christopher Gikonyo Njuguna** who acreage is set at **0.405 Hectares**. He does not know the said Christopher Gikonyo Njuguna. He stated that the application and consent of the Land Control Board produced as **D. Exhibit 12 (a) and 12(b)** respectively stated that there were **420 acres** for distribution. He testified that he went before Cherangany Land Disputes Tribunal which awarded him **11.5 acres**; however the secretary to the company was not comfortable with the award and he appealed seeking to quash the decree of the Tribunal which had been adopted in **Kitale SPMCC Land Case No. 26 of 2004**; that a consent was entered into by the parties, thereby agreeing that the Tribunal did not have mandate to deal with the dispute. He denied having been allocated the said size of land or that he subsequently sold it all.

The Defendants' Evidence

5. **DW1, Cosmas Wafula Barasa** who is the 3rd defendant testified on 19/7/2018; his evidence was that the plaintiff sold him **1 acre** of land in 1986 for **Kshs.12,500/=** vide a written agreement a copy of which he produced as **D.Exhibit 1**; that in 1992 he added **2 points** vide an agreement dated 11/7/1992 which was produced as **D. Exhibit 2**; that in the year 2000 he bought **1 acre** from Lumboka Farm Ltd at **Kshs.70,000/=**; that from the time he bought the land no one ever moved him and when the surveyors came they confirmed him on the land. In the year 2000 he was allocated **Plot No. 28** and the plaintiff was allocated **Plot No. 26**.

6. **DW2, Richard Kisambe**, the 4th defendant testified on 19/7/2018. He stated that he bought a parcel of land measuring **7 acres** from the 1st defendant between 1981 - 1982; that he paid for the land in small instalments. He produced original receipts No. 1726 (for Kshs.10,100/=); receipt No. 1766 for Kshs.3600/=; Receipt No. 1216 for Kshs.400/=; Receipt No. 1744 for Kshs.900/= and Receipt No. 1780 for Kshs.7000/=. Those receipts were issued on dates between 1981 to 1989. The total amount he paid for the land is **Kshs.22,000/=** and upon survey he was allocated Plot No. 18. That plot is reflected in **D. Exhibit 1** as measuring **2.833 hectares**. He denied ever transacting with the plaintiff.

7. **DW3, Fredrick Kipsang Boit**, the 5th defendant testified on the same date. He stated that his late mother bought the land from Lumboka Estate Limited. He produced a copy of the agreement as **D. Exhibit 6(a)** and the original receipt as **D. Exhibit 6(b)**. Pursuant to that agreement she was given **4 acres** of land and she paid the survey fees in the year 2000; the plaintiff had complained against him before the DO and the DO referred the matter to the Surveyor Kitale; that while at the DO's office the plaintiff identified his plot as No. 27; that the plaintiff never came before the District Surveyor; that the District Surveyor ordered **DW3** to pay to enable him to come and view the boundary which he did on 18/4/2007; that the District surveyor visited the site and confirmed that **DW3** is on his rightful plot. **DW3** denied having bought any land from the plaintiff or having entered his land.

8. **DW4, Christopher Machimbo**, the Company Chairman Lumboka Estate Limited testified on 9/10/2018. He identified the plaintiff as a member of the company; he identified Cosmas Wafula the 3rd defendant, 4th defendant and the plaintiff as the members of the company however he confirmed that the 5th defendant lives on the land that belonged to his mother; that the 3rd 4th and 5th defendants bought land from the company and were given receipts; that the plaintiff initially bought **4 acres** from the company then **2 more acres**; therefore he sold land to **10 people** who still reside thereon and whose names were included in the area list; that there was one area list for all the members and everyone signed on that area list; that there were **128 members** who were now in the process of getting titles and that the plaintiff was left with **0.4 acres**.

9. **DW4**, the 2nd defendant, **Elius Kimingu Cheses**, testified on 9/10/2018 and stated that he bought **10 acres** from James Matei; that he was absent when surveyors came to the land but his wife was present; that the Chairman divided his land into two portions one of **7 acres** and the other of **3 acres**; that when his wife complained she was arrested; however the chairman gave his son a **1 acre** portion which the plaintiff is now claiming. He stated that it is the chairman who allocated his son land where it is situated and that it is only the chairman who can answer to the claim.

10. **DW5, Mary Ndesi Elius** testified on 11/10/2018 and stated that she is the wife to **DW4**; that **DW4** bought **10 acres** from one **James Maleko** and they took possession thereof; that however some of the land was lost to another person and when she protested she was arrested; that the land was surveyed when she was incarcerated and while she was in incarcerated her son was allocated land on the plaintiff's portion by the chairman. She admitted that the plaintiff was talking the truth when he said that part of his land was taken away.

Submissions

11. The plaintiff filed his submissions on 16/11/2018. Submissions were also filed on behalf of the 1st, 3rd, 4th and 5th defendants on 22/11/2018. I have considered the pleadings, the evidence and the submissions of the parties. The issues that arise in this suit are as follows:

(1) Was the plaintiff made a shareholder of the 1st defendant?

(2) Was the plaintiff allocated land measuring 11.5 acres and did he take possession of the same?

(3) Was 10 acres of the plaintiff's land taken by the 1st defendant and distributed amongst the rest of the defendants?

(4) Should the defendants be evicted from the land they occupy?

(5) What orders should issue?

(1) Was the plaintiff made a shareholder of the 1st defendant?

12. PExh 1, which the plaintiff erroneously believes is the certificate of incorporation of the company, is a copy of a letter from the Department of the Registrar General showing the shareholding within the company. The plaintiff is not listed as a shareholder in the company on that letter dated **2/12/1985**.

13. PExh 2 is the agreement purportedly made between the plaintiff and the directors of the 1st defendant. It states that the directors have admitted him as a member in the company, and that he was entitled to purchase land at **Kshs. 2,500/= per acre**. The document does not however bear the official stamp or seal of the company.

14. In my view therefore the plaintiff has not established by way of evidence that he became a shareholder of the 1st defendant company. No share certificate was produced showing how many shares in the company were allocated to the plaintiff.

15. However **DW4**, the company chairman recognized the plaintiff as a member in his testimony. It appears that “membership” in the 1st defendant company was based on other considerations other than holding a share certificate in the company. On this basis alone the plaintiff is taken by this court to have been a member of the company.

(2) Was the plaintiff allocated land measuring 11.5 acres and did he take possession of the same?

16. No letter of allotment was produced to show whether the plaintiff was allocated any land parcel by the company. The receipts produced as **PExh 3(a) - 3(h)** do not also bear the number of any parcel of land. They generally state that the payments they reflect were in respect of “land.”

17. The survey fee receipts that were produced as **PExh 4(a) –(c)** do not also bear any land parcel number.

18. No map was produced by the plaintiff to show the layout of the plots, and the position of each in relation to one another to support the allegation that the plots held by the 2nd -5th defendants were carved out of one mother parcel that had been allocated to the plaintiff.

19. In particular there is no evidence that the plaintiff was issued with plot number 27, or that the plot he was allocated measured **11.5** acres.

20. The plaintiff’s oral evidence departs from his pleading in that whereas he states in his pleadings that he was allocated plot number 27 measuring **11.5** acres and that he was entitled to that size of land from the 1st defendant, he stated at the hearing that he should have been allocated **13.1** acres; whereas he stated in his pleadings that he was left with only **1.5** acres, he stated at the hearing that he was left with **2.7** acres.

21. A simple calculation of his entitlement at the cost of **Kshs. 2,500/= per acre** brings one to the total of **15.87** acres. The plaintiff expressly states that he was given plot no **27** measuring **2.7** acres. Then he began selling land to other people. He sold a total of **2.1** acres to several persons and remained with only half an acre.

22. However, he avers that a secretary of the company by the name Christopher Majimbo put the defendants 2nd - 5th in possession of various portions of plot number **27** all totalling up to **8.9** acres.

23. If one adds the total size of the land said to be in the hands of the 2nd - 5th defendants to the land the plaintiff confesses to have been issued, the total is **11.6** acres, a figure close to what is claimed in the pleadings.

24. The evidence of the defendants is that their respective parcels of land were not carved out of the plaintiff’s land but were purchased from the company.

25. DExh 1, an area list, shows that plot number 27 measures 0.405 acres and that it was allocated to one Christopher Gikonyo Njuguna. According to **D Exhibit 1**, the plaintiff was allocated plot number 26 measuring 0.952 acres.

26. Save for No. 30 - Johnstone Khisa Kololi (26.3 acres) No. 109 - Christopher Wasike Machimbo (18.62 acres) the size of land allocated to each of the other persons listed on the area list **DExh 1** was not more than 5.5 acres. It is notable that according to **PExh 1**, one Johnstone Khisa was a director shareholder of the company, and he held 400 shares.

27. However since I have already found that the plaintiff has not proved that he was allocated plot number 27 and that at the time of such allocation that plot measured **11.1** acres, or that there was subsequent subdivision of that plot to enable distribution of the resultant plots to the 2nd to 5th defendants the answer to the issue currently under discussion is in the negative. I am unable to find from the evidence given that the plaintiff was allocated **11.5** acres and that he took possession of the same.

(3) Was 10 acres of the plaintiff’s land taken by the 1st defendant and distributed amongst the rest of the defendants?

28. Though the defendants 2nd - 5th admit that they are neighbours to the plaintiff, it logically follows from the answer to issue number 2 above that 10 acres of land were not taken away from the plaintiff and given to the 2nd - 5th defendants by the 1st defendant.

29. Besides, the 2nd to 5th defendants gave an account of how each acquired their land. The 3rd defendant admitted that he bought one acre from the plaintiff in 1986 and two points in 1992. In year 2000, he bought one acre from Lumboka farm at Kshs. 70,000/=.

30. The 4th defendant testified that he bought 7 acres from the 1st defendant between 1981 and 1982.

31. The 5th defendant testified that the land he holds was bought by his late mother from the 1st defendant.

32. The 2nd defendant testified that he bought 10 acres of land from one James Matei but he lost 3 acres when survey was done in his absence.

33. The 2nd defendant's wife, DW5 appeared to admit that some land measuring one acre was taken from the plaintiff and given to her son. However, considering the totality of her evidence, this court gets the impression that what she is concerned with is more that their family land was split into two whereas it should have been retained as one portion.

34. The 3rd 4th and 5th defendants produced receipts for the monies they paid the 1st defendant as consideration for the land they bought as well as survey receipts.

35. I do not therefore find any evidence that the plaintiff's 10 acres were taken and distributed by the 1st defendant to the other defendants.

(4) Should the defendants be evicted from the land they occupy?

36. Considering the fact that DW4 admitted that the plaintiff was a leader in the company and that he paid for the land, it may be true that the plaintiff may have been entitled to the land reflected in the sums he paid to the company.

37. Payment of monies for land in a company is an event separate from allocation of land on the company farm. Both had to be proved if the plaintiff's claim was to succeed.

38. The 2nd to 5th defendants have been on the land for a long time. Their entitlement to the land was confirmed by the surveyors who found them settled thereon during the survey exercise in the year 2000. A suit filed 13 years later, like this one, is coming too late in the day and should not be allowed to incommode their otherwise idyllic life on what they now consider to be their land. They should be permitted to go on dreaming and realizing their dreams on the said land, unhindered.

39. The plaintiff paid his monies in instalments and his entitlements arising out of that mode of payment may have been spread out across the farm and may not necessarily have been located where the 2nd - 5th defendant's parcels are.

40. An examination of the record shows that a lot of evils may have occurred owing to the settling of shareholder's families and other persons on the land before each shareholder's rights were properly determined and their portions demarcated. However, the plaintiff has failed to dissect the miasma of chaos that characterized the purchase, allocation and subdivision of the company land so as to establish his claim.

41. The plaintiff has therefore failed to convince this court that he had been allocated land measuring 11.5 acres or that his land was illegally distributed amongst the 2nd - 5th defendants, yet that is the backbone of his claim in the plaint.

42. There is no sufficient evidence to warrant a conclusion that the land that the defendants are holding was illegally obtained from the plaintiff.

43. Consequently it is my view that the plaintiff has not proved that the defendants should be evicted from the land they currently occupy.

(5) What orders should issue?

44. In the final analysis I find that the plaintiff has not established his claim against all the defendants on a balance of probabilities and I issue the following orders:

(a) The plaintiff's suit is dismissed.

(b) The plaintiff shall bear the costs of this suit.

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 defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019