



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND ACT AT MURANGA

ELC NO. 20 OF 2018

KENNEDY KIMANI NDARWAPLAINTIFF

VS

METHI & SWANI COOPERATIVE

SOCIETY LIMITED1ST DEFENDANT

PETER IRUNGU KAMAU2ND DEFENDANT

JUDGMENT

1. By a plaint dated 27/3/12 the Plaintiff filed suit against the Defendants claiming an ownership right over all that parcel of land known as Mitiburi/ Wempa/Block 2/14 hereafter referred to as the suit land sued the 1st and 2nd Defendant seeking the following reliefs;

- a. That the 1st Defendant be ordered to cancel all entries in their records that purport to give the second Defendant ownership of the suit land.
- b. That the honourable Court be pleased to order the District Land Register Murang'a to cancel the registration of the 2nd Defendant as the owner of Mitiburi/ Wempa/Block2/14 as the owner of the suit land and a title deed be issued to him.
- c. Costs of this suit to the Plaintiff.

2. The facts for the Plaintiff's case is that the Plaintiff became a member of the 1st Defendant in the year 1992 by buying shares from one of its members namely Philip Maina Wachira vide share certificate number 3872 and they proceeded to execute the transfer of his shares before an advocate in the same year the Plaintiff was also taken to the offices of the 1st Defendant where he executed the transfer forms. It was the expectation of the Plaintiff like all the other shareholders that he would be allocated land that is commensurate to the shares he bought and indeed he was allocated the suit land which was shown to him by the 1st Defendant and he immediately took possession and occupation of the same. He later learnt in 2011 that the 1st Defendant was issuing titles to the shareholders and went to their offices to secure the issuance of his title but was shocked to learn that his land had been allocated to the 2nd Defendant and a title issued to him. He claims to have lodged complaints with the 1st Defendant which went unresolved. He avers that he is aggrieved by the actions of the 1st and 2nd Defendants and seeks for cancellation of the title issued to the 2nd Defendant and be replaced with his name.

3. In the statement of defence the 1st Defendant denies that the Plaintiff was a shareholder with them and avers that all their bonafide shareholders were allocated land and later issued with title deeds accordingly. That the 1st Defendant was not privy to the alleged sale and transfer of shares from Mr. Wachira to the Plaintiff and denies putting the Plaintiff into possession of the suit land. They claim that before the allotment people were free to till any part of the land and suspects the Plaintiff was one of such who randomly tilled on the land without necessarily being a shareholder. They deny that the Plaintiff ever reached out to them to settle the matter amicably. They also contested the jurisdiction of this honourable Court in respect to claims relating to Cooperative Societies which they opine should only be heard by the Cooperatives Tribunal.

4. The second Defendant was served through substituted service vide orders issued by Hon. Wakiaga J on 23.04.2013 against an ex-parte application dated 30.01.2013.

5. The 1st Defendant had filed a Preliminary objection challenging the jurisdiction of this Honourable Court which was dismissed vide a ruling delivered on 09.06.2016 of Hon. L.N Waitthaka J. The Learned Judge held that this being a land matter was competently before the ELC Court and not the Cooperatives Tribunal.

6. The matter proceeded viva voce with three (3) witnesses testifying for the Plaintiff's case whilst the counsel for the defendants opted to proceed without calling any witnesses.
7. PW1 testified that he bought shares from a person who was known to him namely Philip Maina Wachira who was a shareholder with the 1st Defendant who wished to sell his shares along with some shares he had bought on behalf of his son who was a minor by the name Peter Karanja Maina. That he began by introducing his friend Gerald Kuria Samuel to the Wachira and Gerald purchased his share which transaction was witnessed by the Plaintiff. The Plaintiff thus developed interest and also bought two shares from Mr. Wachira on 29.11.1992 one of them was in the name of Mr. Wachira and the other was in the name of his son a minor being share certificate numbers number 3872 for plot number 14 and 4079 for land parcel number 2983 new number 17 respectively. That the seller delivered all the documents to him plus the land in vacant possession which he proceeded to take possession immediately and started tilling the land and has been in occupation and use to date and has never been evicted. Later on 15.11.2005 and 17.11.2005 the seller and his son who was now an adult transferred the shares to the Plaintiff with the transaction being witnessed by PW2. Thereafter in 2011 on learning that the 1st Defendant was now issuing titles to the shareholders he went to the 1st defendant's offices with his original documents only to learn that the title to his land had been issued to the 2nd Defendant. He produced the following documents in support of his claim share certificates, transfer of shares / stock, receipts for payment, correspondence from the original owner to the 1st Defendant, affidavit by Peter Karanja Maina, letter from Ministry of Cooperatives to the 1st Defendant in respect to the complaint lodged by the Plaintiff and letter from the Plaintiff to the District Cooperative office Murang'a south, inter alia.
8. PW2 – reiterated the averments made by the PW1 on the process the Plaintiff followed towards acquiring shares with the 1st Defendant and the suit land thereof. He confirmed that he is the one who witnessed the sale of shares to the PW1 by the Mr. Wachira.
9. PW3- the wife of the Plaintiff testified that she was aware that her husband purchased two shares from Mr. Wachira whom she got to meet in the year 1992, her husband fully paid the purchase price and they immediately took possession of the lands that were allocated to them and started tilling the land and have been tilling the land to date. That her husband discovered that their land was allocated to the 2nd Defendant and a title issued to the 2nd Defendant when they went to collect their own title.
10. The Plaintiff submitted that he has been in exclusive possession of the suit land since the year 2005 when he purchased shares with the 1st defendant. That the 1st Defendant sanctioned the sale of the shares to him at the 1st defendant's offices where he was accompanied by PW2. That the 1st Defendant then put him into possession of the suit land. He suspects that the 2nd Defendant colluded with the 1st Defendant to defraud him of his rightful share in the land. He urged the Court to grant the prayers in the suit.
11. The defendants submitted that the Plaintiff has not proved ownership of the suit land as per the register to collate the share certificate to R.I.M number and further claims that the 2nd Defendant is not aware of the instant suit yet there is a notice of appointment of advocates on his behalf on record. Further that the land that was owned by the 1st Defendant was free for occupation by anyone before the allotment and suspects that the Plaintiff is one of those random occupants who are tilling on the land without being shareholders of the 1st Defendant and have continued to remain there on with no legal justification. They challenged the jurisdiction of this Court in respect to the which should be dealt with by Cooperative Societies. They contend that the 1st Defendant is not properly suited in this matter because the 1st Defendant was placed under liquidation. They suggest that the Plaintiff should have sued the liquidator instead. They admit that Philip Maina Wachira was an employee of the 1st Defendant but was fired for misconduct and was involved in unscrupulous deals.
12. Having reviewed the pleadings, the evidence and the submissions the key issue for determination is whether the Plaintiff has proved his claim to the suit land.
13. The Plaintiff herein lodged his claim in respect to the suit land and explained how he acquired the suit land after purchasing shares from one of the initial shareholders of the 1st Defendant whereupon the shares were transferred to him accordingly. That he was then put in possession of the suit land in vacant possession which he began tilling in the year 1992 to date and has never been evicted. He claims to have fully paid the value of the shares. And that the 1st Defendant sanctioned the sale as the transfer was done at their offices. He has produced documentary evidence in support of his claim in form of a share certificate in his name and transfer forms in his favor. He also produced several correspondences with the original owner and also letters that he used to lodge complaints when he discovered that the title to the land that was allocated to him had been registered in the name of the 2nd Defendant. His evidence was strongly corroborated by PW2 and PW3.
14. The evidence of the Plaintiff was unopposed as both Defendants failed to attend the hearing of the case despite being duly notified of the same. The statement of defence by the 1st Defendant on record contains mainly denials of the averments made by the Plaintiff and does not raise triable issues while that filed on behalf of the 2nd Defendant relates to a party that is not suited herein and alludes to a parcel of land that is not the subject matter of the suit herein.
15. The 2nd Defendant is the registered owner to the suit land and holds a title thereto as conceded in the pleadings by the Plaintiff. The Plaintiff has not pleaded nor demonstrated that the title to the suit land was fraudulently acquired by the 2nd Defendant and neither has he demonstrated that there was misrepresentation of facts by the 2nd Defendant in the acquisition of the title by him. The 2nd Defendant did not adduce any evidence on how he may have acquired the suit land. There was no list of the alleged shareholders of the 1st Defendant produced to ascertain if the Mr. Wachira and the 2nd defendant were indeed shareholders of the 1st defendant. The Plaintiff did not bother to call either Mr. Wachira or any of the officials of the 1st Defendant who sanctioned the sale of the shares to him to shed more light to the many gaps left unanswered in his testimony.
16. I have looked at the share transfer dated the 29/11/92 from the said Wachira to the Plaintiff as well as the old share certificate in the name of Wachira. There is no evidence that a new share certificate was issued to the Plaintiff. The old one on record dated 30/11/1988 bears the name of the Plaintiff and that of Mr Wachira but the latter is deleted. It would appear that no share certificate was issued to the plaintiff

17. Section 26 of the registration of titles act provides;

(a) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(b) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(c) where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”

18. The Plaintiff has not produced the transfer document for the suit land signed by the vendor, Mr Wachira and consented by the officials of the 1st Defendant. The Plaintiff showed the Court that he had bought another land LR Ref No 2983 where in the transfer was duly executed but not for parcel 3872. He has annexed a transfer of shares between himself and one Philip Maina Wachira in respect to share certificate No 3872. It does not indicate how many shares the Plaintiff was buying from the said Wachira. There is no nexus between the share certificate and the suit land which is Mutimbiri /Wempa /14. Further the receipts presented do not show for which land they were paid for. They refer to 1989 and it is the Plaintiff 's case that he bought the land in 1992. There is a letter dated the 4/5/1989 by the said Philip Maina Wachira addressed to the chairman of the 1st Defendant seeking to be given parcel No plot No 14 in exchange for plot 137B. There is no evidence to show that the said request was acceded to by the 1st defendant. All the receipts contain erasures where the name of Philip Wachira has been deleted and replaced with that of the Plaintiff. There are therefore no receipts in the names of the Plaintiff except one dated the 15/11/2005 for the sum of Kshs 2000/- being office maintenance and legal fees.

19. Section 10(1) of the Evidence Act provides as follows;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

20. In the premises I consider that the Plaintiff has not presented sufficient evidence before this Court to warrant the orders sought in respect to cancellation of the 2nd defendant's title. The Plaintiff has not discharged the burden of proof as to the extent and nature of his alleged ownership of the suit land and his claim fails.

21. The Plaintiffs claim is dismissed.

22. I make no orders as to costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Mumbuya HB for Kebuka Wachira for the Plaintiff

Mugo Moses for the 1st and 2nd Defendants

Kuiyaki and Njeri, Court Assistants