



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 560 OF 2002

FRANCIS GITAU NJUNGE.....PLAINTIFF

VERSUS

THINDIGUA COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 26th March 2002 and amended on 13th June 2006, the plaintiff has filed his suit against the defendant seeking:-

(a) A declaration that the plaintiff is the rightful owner of Plot No.76/638.

(b) An order compelling the defendant to transfer Plot No. 76/638 to the plaintiff.

(c) Costs of the suit.

(d) Any other relief the court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance, the defendant entered appearance and filed a statement of defence dated 5th June 2002.

3. Pw1 Francis Peter Gitau Njunge, the plaintiff told the court that he is a shareholder and member of the defendant. He further told the court that he balloted for Plot No. 285 which was later allocated LR NO. 76/638. He produced the ballot as exhibit P1. He said he also balloted for No. 284 which has no dispute. He produced the beacon certificate as exhibit P2. He said he took possession of the plot in 1992. Further that the defendant has refused to issue him with a title deed for the said parcel of land. He produced two letters dated 11th March 1992 and 18th March 1992 as exhibits P3 and P4 respectively. The said letters invited him for a meeting at the defendant's offices. He also produced another letter for M/S Munene & Company Advocates as exhibit P5. This particular letter refers to Plot No. 284. He produced another letter from the said Advocates dated 27th May 1992 as exhibit P6.

4. PW1 further told the court that he has since sold Plot No. 285 to Joseph Kimani but could not complete the transaction because the defendant has not issued him with a title deed. He produced another letter which the defendant threatened to evict the said Joseph Kimani as exhibit P7. He however, stated that the family of the said Joseph Kimani is in possession.

5. He prays that the defendant be compelled to issue him with a title deed for LR No. 76/638. He also seeks costs of the suit.

6. The defendant on its part called one witness. DW1 Simon Mwangi Njeru told the court that he is the chairman of defendant. He said he is one of the directors of the defendant. In support of the defendant's case he produced the following documents:-

(a) Pleadings in HCCC No. 2163 of 2001 – Exhibit D1

(b) Ruling dated 10th May 2010 in ELC 2358/2007 – Exhibit D2

(c) Minutes of Thindigwa Company Limited Exhibit - D3

(d) Indenture of LR No. 76/396- Exhibit D4

(e) Notice dated 7th November 2001 – Exhibit D5

7. DW1 further told the court that the plaintiff wants more than two plots and yet each shareholder was entitled to two plots only. That the plaintiff has taken LR NO. 76/395 and 76/396. LR NO. 76/396 as per Exhibit D4 was allocated to Ndaguatha Kiarie, another shareholder. By the plaintiff having taken LR No. 76/395 and 76/396, he was asked to surrender LR NO. 76/638 before the titles could be processed. He finally told the court that the defendant could not give the plaintiff title to LR NO. 76/638 unless he surrenders LR NO. 76/396.

8. I have considered the pleadings, the evidence on record and the exhibits produced. The issues for determination are:-

(i) Whether or not the plaintiff as a shareholder of the defendant was allocated Plot No.76/638 by the defendant.

(ii) Whether or not the plaintiff balloted for two plots namely LR NO. 76/638 and LR NO. 76/395.

(iii) Whether the plaintiff later encroached, trespassed and without any lawful right occupied Plot No. LR NO. 76/396 allocated to another shareholder and immediately constructed a permanent residence on both LR NO. 76/395 and LR NO 76/396.

(iv) Whether or not the defendant resolved at a general meeting of the shareholders not to transfer LR NO. 76/638 and LR NO. 76/395 to the plaintiff until the plaintiff either vacate LR NO. 76/396 or surrenders LR NO. 76/638 to enable the defendant compensate the rightful owner of Plot NO. 76/396.

(v) Whether or not the suit should be struck out.

(vi) Which party should bear costs of this suit.

9. There is no doubt that the plaintiff was a shareholder of the defendant. He balloted for Plot No. 285 which was later allocated LR NO. 76/638. He produced the ballot for Plot NO. 285 as exhibit P2. It is not in doubt that he was issued with a beacon certificate for Plot No. 284 and 285. The plaintiff however ought to have produced the share certificate to confirm how many plots each shareholder was to get. It can be said that the plaintiff was entitled to Plot Nos. 76/395 and 76/638.

10. It is the defendant's contention that the plaintiff encroached and trespassed into LR NO. 76/396 which was allocated to Ndaguatha Kiarie as per EX-D4. That he has constructed a permanent residence in both LR NO. 76/395 and 76/396 thereby making it impossible for the other shareholder to occupy the same. This is the claim by the defendant in paragraph 5 of the statement of defence. The plaintiff has not rebutted the claim. In fact he has been evasive on this issue.

11. The same claim was repeated by DW1 in his evidence in court. The plaintiff has failed to shake this claim. He admits that there exists HCC Civil Suit No. 2163 of 2001 in which the defendant has sued him (plaintiff) and Joseph Kimani. The suit is still pending. The plaintiff has sold the Plot LR NO. 76/638 to Joseph Kimani.

12. I have considered the evidence on record and came to a conclusion that the plaintiff may be in possession of two plots already. He has known all along that he needs to surrender one plot to the defendant. This was confirmed by the letter from M/S Munene & Company Advocates dated 22nd January 2002 who were previously on record for the defendant. He has not explained to the court why he has no dispute with the defendant with respect to LR NO. 76/395. I find that the plaintiff has not been entirely honest. He has failed to produce any evidence to confirm he was entitled to more than two plots.

13. The indenture produced as exhibit D1 shows that LR No. 76/396 was allocated to Ndaguatha Kiarie who had earlier sued the defendant and others. The plaintiff was categorical that the instant suit should not be consolidated with HCCC 1263/2001. When cross examined by Mr. Gatitu, the plaintiff claimed that it was resolved that he be issued with titles for the plots he balloted for. He however produced no minutes to confirm this.

14. I find that the plaintiff has failed to prove his case in a balance of probabilities as against the defendant. This is an issue that ought to have been sorted out between the parties. The plaintiff still has an opportunity to put forward his case in HCCC 12630 of 2001 as against the suit. As regards this suit, I have no alternative other than to dismiss it with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 4TH day of APRIL 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant