



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 65 OF 2018

KENNEDY KIMANI NDARWAPLAINTIFF

VERSUS

METHI & SWANI CO-OPERATIVE

SOCIETY LIMITED.....1ST DEFENDANT

MAGDALINE NYAMBURA NDUNGU.....2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 27/3/12 the Plaintiff filed suit against the Defendants seeking the following reliefs;

- a. That the 1st Defendant be ordered to cancel all entries in their records that purport to give the 2nd 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/Block2/17 (the suit land) and a title deed be issued to him.
- c. Costs of this suit to the Plaintiff.

2. It is the Plaintiff's case that he became a member of the 1st Defendant in 1992 through purchase of shares from Peter Karanja Maina who was then a minor and a member. The shares were comprised in a share certificate No 4079. That he negotiated the sale of the shares with Philip Maina Wachira, the father of Peter Karanja Maina. That he executed a share transfer form of the said shares on 29/11/92 and in 2005 he and the Peter K Maina (on attaining the age of majority) went to the offices of the 1st Defendant where they executed the transfer forms in the presence of the officials of the 1st Defendant. He claims that he then was allocated the suit land on the basis of the acquired shares and took possession immediately. In addition he claims that the 1st Defendant allocated the same suit land to the 2nd Defendant and issued him with a title and seeks that the title be cancelled and issued to him.

3. The 1st Defendant denied the Plaintiff's claim and stated that it is not privy to the contract of sale of shares. It contended that all its bonafide members have been issued with titles for their lands. It denied that the Plaintiff is its member and that it has no record to support his alleged membership. It denied that it put the Plaintiff into possession of the suit land. Finally, the 1st Defendant denied the jurisdiction of the Court and averred that the matter should be referred to the Cooperative Tribunal for hearing and determination. It undertook to raise a Preliminary Objection.

4. The 1st Defendant was served by substituted services through advertisement in the Daily Nation of 26/4/13 but he did not challenge the suit.

5. At the hearing the Plaintiff gave evidence and reiterated the contents of his pleadings and the witness statement filed on 19/7/13. In addition, he stated that he bought shares comprised in share No 4079 for parcel No 2983 (new number 17) in 1992 and took possession of the suit land. That the seller surrendered all the documents to him and he commenced cultivation of the land. That in 2005 the seller Peter K Maina transferred his shares (certificate No 4079) on 17/11/2005. That in 2011 he learnt that the 1st Defendant was issuing titles to members and went to the 1st Defendants office with all his documents only to find that the title had been issued to the 2nd Defendant. His request to the officials of the 1st Defendant to rectify the title fell on deaf ears and he lodged a caution on the suit land and later filed the suit.

6. PW2- Gerald Kuria Samuel testified that he is the brother of the Plaintiff and that he also was a member of the 1st Defendant Company from whom he too purchased shares and land from Philip Maina Wachira. That it is the Plaintiff that introduced him to said Wachira. That he

was present when the Plaintiff negotiated the purchase of the shares with Wachira, took possession of the land and received documents from the said Wachira. He stated that the Plaintiff is the rightful owner of the suit land. That he is in occupation of the land since 1992.

7. PW3- Veronica Wanja Wanderi stated that she is the wife of the Plaintiff. She confirmed that the Plaintiff is in possession of the suit land. She stated that her husband informed her on 29/11/92 that he was going to buy the suit land and that the law firm of Kamau Kinga Advocates would handle the transfers. That later he was given all the original documents in respect to the shares of the suit land. That in December 1992 he showed her the plots Nos 14 and 17 and they commenced cultivation. That in 2011 the Plaintiff took all the original documents to the 1st Defendant for title issuance but he was not given the title as the same had been allotted to the 2nd Defendant.

8. At the close of the Plaintiffs case the Defendants elected not to present any witnesses but instead closed their case. Parties then filed written submissions which I have read and considered.

9. The Plaintiff submitted that he has been in exclusive possession of the suit land since 1992 wherein he has developed it by planting trees and building houses. That all that time nobody has asked him to vacate the suit land. That he produced the share transfer form executed before an advocate as well as the 1st Defendants transfer form which was signed and stamped by the officials of the 1st Defendant. That the Plaintiff's case is unchallenged.

10. The Defendants submitted that the suit land belongs to the 2nd Defendant as per its records. They submitted that the Plaintiff does not occupy the suit land and that he lives on another land. That before the titling of the farms by the 1st Defendant, its members would occupy and till any part of the land but would vacate and move to their respective lands after the issuance of titles. That the Plaintiff has not proved his case by way of ballot and Registry Index Map which would ordinarily correspond to each other. In addition, they submitted that the Court does not have jurisdiction to hear the matter and further that the suit was filed without leave of the Court and contrary to section 235 of the Companies Act which require that one seeks leave to sue a company in liquidation. That the 1st Defendant is in liquidation.

11. Having reviewed the pleadings, the evidence and the submissions the issues for determination are;

a. whether the suit is fatal?

b. Whether the Plaintiff has proved his claim to the suit land?.

12. The Defendants have argued that the suit is bad in law and should be dismissed as the Plaintiff sued the wrong party as opposed to the Liquidator of 1st Defendant. That the 1st Defendant is in liquidation and the Plaintiff ought to have sought leave to continue the suit. I have examined the record and this issue was not canvassed at the hearing of the case and it is being introduced at the submissions stage. It is trite that submissions are not evidence of a party. I decline to entertain the matter. The other issue of want of jurisdiction of the Court is resjudcata as the same was determined by Justice Waitthaka on the 9/6/16.

13. In respect to the 2nd issue, 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 begun 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 while the 2nd Defendant though served did not file any defence.

15. The 2nd Defendant is the registered owner to the suit land and holds a title thereto as conceded in the plaint 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 1st Defendant in the acquisition of the title by him. The 2nd Defendant did not adduce any evidence on how she 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 Plaintiff 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 examined the documents produced by the Plaintiff in support of his case. Firstly, the Plaintiff averred that he signed the first share transfer form on the 29/11/92 between him and Mr Wachira. That in 2005 he and Peter Karanja Maina went to the 1st Defendants office and executed the transfer form for the suit land. He referred to the transfer form dated 17/11/2005. The 1st Defendant had denied this form that its officials did not execute the form. The Plaintiff did not call any of the officials to attest to his claim. The transfer form refers to Plot No 2983. The Plaintiffs claim is in respect to plot No 17. There is no nexus between the two plots. The form refers to the transfer of shares. The Plaintiff did not produce a ballot which corresponds to the plot No. 17. Neither did he produce any RIM to support the existence of the suit land on the land that he alleges to be in occupation. There was no site report to show that indeed he is in occupation of the said plot No 17. The Court has not been shown the link or nexus between the share certificate No 4079 and the suit land. The said share certificate was not even presented in Court. It is doubtful whether the same exists and if it does in whose name. I have also seen receipts in the name of Peter Karanja Maina which have been crossed and the name of Plaintiff inserted on top. These receipts refer to the period 1989 before the Plaintiff acquired the suit land.

17. 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. He has annexed a transfer of shares between himself and one Philip Maina Wachira in respect to share certificate No 4079. 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 /17.

18. 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.”

19. Section 80 of the Land Registered Act states as follows;

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”.

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 Court noted that the copy of official search of the said title was not presented before the Court to authenticate who the registered owner of the suit land is. 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 20TH DAY OF JUNE, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kebuka Wachira for the Plaintiff

Asimwe HB Mugo Moses for the 1st and 2nd Defendants

Njeri and Kuyiki, Court Assistants