



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 175 OF 2002

JOSEPH MBUVA.....PLAINTIFF

VERSUS

WAICAKEHIRI FARMERS CO-OPERATIVE

SOCEITY LTD (Sued through Chairman

ROBERT KIMATHI MARETE).....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff commenced this suit by way of plaint dated 24th October 2002 seeking the following:

(a) A permanent injunction against the defendant, its agents and servants from interfering, entering or otherwise deriving any gain or rent from the plaintiff's tenants on parcel of land No. TIMAU SETTLEMENT SCHEME/7693 Part A as per the map approved by the Commissioner of Lands and a refund of any money received by the defendants from the plaintiff's tenants aforesaid.

(b) An order to remove any caveat or any inhibition to caution by the defendants against parcel of land No. TIMAU SETTLEMENT SCHEME/7693.

(c) Costs and interests.

The plaint was filed simultaneously with an application under certificate of urgency seeking temporary injunction order. When the said application was placed before the duty Judge, the same was certified urgent. The duty Judge also issued a temporary injunction order restraining the defendants, its agent or servants from entering, interfering, or otherwise demanding or receiving rents from the plaintiff's tenants on the plaintiff's five (5) acres of land on parcel No. TIMAU SETTLEMENT SCHEME/7693 pending the hearing of this matter.

On 4th November 2002, the defendant filed a replying affidavit and a statement of defence denying the plaintiff's claim and the application.

PLAINTIFF'S CASE

The plaintiff testified on oath and called one witness. In his testimony, the plaintiff referred to his witness statement recorded on 10th January 2014 which he adopted in his evidence. He stated that the suit property measures five (5) acres. He first bought four (4) acres on 19th April 1991 and later bought one (1) acre to make a total of five (5) acres. He stated that he bought the land from the defendant through its directors then and that he was given exclusive possession and original ownership title. He took possession of the land with three permanent houses and three semi-permanent houses made of iron sheets. He also stated that he took over the tenants who were occupying those houses and started collecting rents from them. There were many maturing trees on the suit land. He also stated that the original owner even attended the Land Control Board for consent. He stated that the purchase price was Ksh. 200,000/= which he paid in full. The land was surveyed and his five (5) acres were excised from the main parcel of land L.R. No. TIMAU SETTLEMENT SCHEME/7693 with clear demarcated boundaries. Upon taking possession of his land, he installed a telephone connection on the land and even paid the survey fees. He then continued using his property awaiting survey process and transfer until the year 2000 when some tenants were inclined by a group of people led by one Robert Kimathi Marete who were claiming to have bought the same land from the defendant Company. The same tenants even filed a Civil Case No. CMCC 28 of 2002 and an application for temporary orders which was dismissed and the Court ordered them to continue paying him rent. The Court order became untenable since the defendant mobilized hooligans who chased him whenever he went to ask for rent. The plaintiff further stated that the defendants in cahoots with the illegal group of hooligans cut down all mature trees on the suit land and sold them in contempt of the Court order and even pulled down the houses which they had sold to him. The plaintiff referred to a list of

documents dated 1st September 2017 containing items marked 1 – 25. The documents were produced as Exhibits in this case except a sale agreement dated 19th March 1991 which was marked **P-MFI 1**. The other documents were produced as Exhibits in this case.

PW2 was Alice Mwikali. She is an advocate currently practicing in the name and style of Kingoo Wanjau & Co. Advocates. She stated that she is practicing as such in Nairobi. From 1988–1992, she was practicing in the name and style of Mwikali Macharia & Co. Advocates. Her firm was situated in Nanyuki Town. She confirmed that she was the one who drew the agreement marked **P-MFI 1**. She then produced the same as Plaintiff's Exhibit No. 1. From her testimony, the witness confirmed that the vendor in that agreement was M'Itunga M'Nguchine while the purchaser was Joseph Mutua Mbura. The agreement was witnessed by one John Gitonga M'Mwirichia and Samuel Mbijjwa Ngaruthi.

DEFENDANT'S CASE

The first defence witness was Patrick Kaburu Magiri who stated that he is a member of Waicakehiri Farmers Co-operative Society and that he was once a secretary to the Management Committee. He referred to his statement dated 14th September 2015 which he adopted in his evidence. He also referred the defendant's list of documents marked 1–11. The plaintiff objected to the production of the documents contained in item 3 & 8 thereof. After hearing submissions by the counsel for the plaintiff and the rival submissions by counsel for the defendant, the Court held that the objection was without basis and allowed the two documents to be produced alongside the other documents as Exhibits. In his sworn testimony, the witness explained how Waicakehiri Company Ltd was incorporated in 1973 by a group of Mau Mau Veterans to enable them buy off land that had been taken by the White Settlers. The initial directors of the said Company were Ritho Mukua, Wambugu Theuri, Muhia Kirungu, Wanyuki Guandaru, Elijah Kiugu, Wairimu Ngunjiri and Wangu Njoroge. These directors were elected from within Mount Kenya region and beyond such as Kiambu, Muranga, Sagana, Nakuru, Nanyuki, Nyeri and Meru. The Company had branches within the seven regions. The witness stated that the sole purpose of the incorporation of the Company was to buy property especially land. Each branch would buy land within its region to be sub-divided to the members who did not have any other land. Each member would get a portion to build a home and cultivate. Since the members comprised in the Meru region were too poor, the branch could not buy any land alone. It incorporated the Kirinyaga branch and together they bought the suit property for its members. After the land was sub-divided to about 150 families, a portion was left on the upper flat side and another on the slopy area near the river. The slopy side near the river is where the White Settler had his homestead. The Settler also had a lot of machineries, generator and other items on the land which were taken over by the Company. The Meru Branch formed a Management Committee with its first chairman called Kibenda. However, the Management Committee wasted the Company properties creating unexplained debts and were finally voted out. Another Management Committee was imposed by the area chief with its chairman namely M'Itunga M'Nguchine. The witness stated that the said M'Itunga and Kibinda were merely chairmen of Management Committee but not directors authorized in law to transact business on behalf of the Company. Since the Company was making losses and incapable of meeting its obligations, the members were advised to form a Co-operative Society and in 1975, the Company was converted into a Society which was registered in 1980. The leaders of this Co-operative Society were one Mr. Njoroge, Mwangi and Ms Wanjiru. The Co-operative Society sub-divided the remaining land amongst its members and their children which took possession and occupied the same. He stated that there has been no resolution to sell any part of the land to the plaintiff or anybody else. He stated that the allegation that the plaintiff bought the suit land from M'Itunga M'Nguchine could only be a fraudulent deal he had with the chairman of the Management Committee in cahoots with his officials. He said that the Society was formed in 1980, long before the alleged sale. He further stated that the plaintiff has never set foot on the suit property and the members do not know him. The agreement produced as Plaintiff Exhibit No. 1 purports that the plaintiff bought land from M'Itunga M'Nguchine and not the defendant or the Society. They have only come to know the plaintiff after filing this case.

DW2 was Robert Kimathi Marete. He is the chairman of Waicakehiri Farmers Co-operative Society. He was elected chairman in the year 2001. He took office from one Mr. Njoroge who was staying in Sagana. He was referred to his witness statement dated 14th September 2015 which he adopted in his evidence. He stated that he was elected chairman of Waicakehiri Farmers Co-operative Society on 15th June 2001 through a special general meeting. Upon being elected, he embarked on re-organizing the Society together with the other Committee members since the same had been run down. The witness testified that the Society started as a Company but due to Government taxes, the members were advised to convert into a Co-operative Society which they did in 1975 and got registered as such in 1980. The witness also referred to the sale agreement produced as Plaintiff Exhibit No. 1 and stated that the same shows that the plaintiff bought four (4) acres while the plaintiff claim is for five (5) acres. He also stated that the seller is one M'Itunga M'Nguchine and not Waicakehiri Farmers Co-operative Society Ltd. He stated that the agreement is drawn by the said M'Itunga M'Nguchine in his personal capacity. The said M'Itunga M'Nguchine was and has never been a director of the Company or the defendant Co-operative Society after the same was converted from a Company to a Co-operative Society. The witness also stated that there was no resolution by the Society to sell the Society's land and that none has been produced.

ISSUES FOR DETERMINATION

The issues for determination can be framed as follows:

- (1) Whether the plaintiff has proved his claim against the defendant.**
- (2) Who shall bear the costs of the suit.**

ANALYSIS AND DECISION

The plaintiff's claim against the defendant is for a permanent injunction. From the pleadings, the plaintiff bought from the defendant four (4) acres of the suit land and subsequently purchased a further one (1) acre. The sale agreement dated 19th April 1991 and produced as Plaintiff Exhibit No. 1 shows that the sale transaction is between M'Itunga M'Nguchine as the Vendor of one part and Joseph Mutua Mbura as the Purchaser of the other part. The portion of land being sold is measuring 4 acres at a consideration of Ksh. Two hundred thousand (Ksh.

200,000/=). The Vendor acknowledged receipt of the sum of Ksh. Twenty four thousand only (Ksh. 24,000/=) being down payment with the balance of Kenya Shillings one hundred and seventy six thousand (Ksh. 176,000/=) to be paid within sixty (60) days after consent has been given by the Land Control Board. The said agreement is followed by two hand-written acknowledgement letters dated 26/11/1991 and signed by one John Gitonga and Samuel Mbijiwe who are identified as secretary and treasurer. The same is not contained in an official Company receipt but an ordinary paper without a Company letter head. The next document contained in the plaintiff's list of documents is an application for consent of the Land Control Board. The nature of transaction is shown as sale of 4 acres at a consideration of Ksh. 200,000/=. The letter of consent gives the consideration as Ksh. 80,000/=. There is no explanation why the consideration is different between that in the application for consent and the consent itself. The Vendor in the sale agreement is given as M'Itunga M'Nguchine and not the defendant in this case. The plaintiff is shown to have paid a down payment of only Ksh. 24,000/=. There is no indication that he paid the balance. The sale agreement also shows that the parcel of land being sold is described as plot No. L.R. 7693 Waicakehiri Farmers Ltd containing by measurements 4 acres or thereabouts. There is no further agreement showing that there was an increment of acreage to 4 acres as alleged. I also wish to take judicial notice that the defendant is a Limited Liability Company who can sue and be sued through its authorized registered directors. The defendant has denied that the persons namely M'Itunga M'Nguchine has ever been one of its authorized registered directors. The plaintiff has not produced any official record from the office of the Registrar of Companies showing that the said M'Itunga M'Nguchine was one of its authorized registered directors. I find that the plaintiff has not proved his claim against the defendant Company on a balance of probabilities. The plaintiff entered into a purported sale agreement of land with one M' Itunga M'Nguchine as Vendor and not the defendant Company. That sale transaction was a private transaction for which the defendant Company cannot be held liable.

Section 107 of the Evidence Act Cap 90 Laws of Kenya states thus:

“107 (1) 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 exists”.

The burden of proof is a principal that was amplified by the learned authors of the leading text book; the *Halsbury's Laws of Kenya, 4th Edition Volume 17 at paragraph 13 & 14* which describes as follows:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. if at the conclusion of the trial he has failed to establish those to the appropriate standard, he will lose. The legal burden of proof normally vests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues”. (Emphasis added).

In the upshot, I find that the plaintiff has failed to discharge his burden of proof. In the result, this suit fails and the same is hereby dismissed with costs.

READ and SIGNED in open Court at Meru this 3rd day of June, 2019.

E.C. CHERONO

ELC JUDGE

3RD JUNE. 2019

In the presence of:

- 1. Mr. Gitonga holding brief for Gikunda for Plaintiff*
- 2. Mr. Muchiri holding brief for Kihara for Defendant*