



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC 38 OF 2018

(FORMERLY NYERI ELC NO 145 OF 2012)

MICHAEL WAWERU KIRUBI AND 7 OTHERS.....PLAINTIFFS

VERSUS

JOHN NDUDNGU MBURU AND 14 OTHERS.....DEFENDANTS

JUDGMENT

1. The present suit was filed at the Nakuru ELC as No. 1145 of 2012 on the 25th July 2013 vide a Plaint dated the 19th July 2013 by the Plaintiffs herein who were the Shareholders of Malewa Ranching Company Ltd where they sought for orders:

a) A declaration that all sub divisions and alienation in respect of the parcel of land originally known as Malewa Ranching Company Ltd situated at Kipipiri District in Nyandarua County of any portion of land contrary to the survey Agreement entered on the 19th January 1998 are null and void.

b) An order for permanent injunction restraining the Defendants whether by themselves servants or agents and/or any person claiming under them from interfering with the Plaintiff's peace and quiet possession of the parcel of land originally known as Malewa Ranching Ltd LR No. 3777/448, 449 and 451.

c) An On order for permanent injunction restraining the Defendants whether by themselves servants, or agents and/or any persons claiming under them from continuing to enter upon, trespass, subdivide alienate and/or issue title deeds to individuals other than the Plaintiffs and the original shareholders in the respect of land parcel Known as LR No.. 3777/448, 449 and 451.

d) General damages to trespass.

e) Cost of the suit plus interest thereon at court rates.

2. Alongside the Plaint, the Plaintiffs also filed a Notice of motion under certificate of urgency dated the 19th July 2013 seeking injunctive orders against the Defendants herein.

3. The court found that since the Plaintiffs were in possession of the suit land they were entitled to the maintenance of status quo on the parcels of the disputed land with the upshot that Defendants were temporarily restrained in terms of prayers 2 of the Notice of Motion.

4. Subsequently parties were not ready to proceed with the hearing of the application with the result that the interim orders were vacated and parties directed to comply with the provisions of order 11 of the Civil Procedure Rules.

5. In essence, the application was compromised indirectly with the orders that parties maintain the status quo only to properties owned and occupied by the Plaintiffs because parties failed to prosecute the said Application due to various reasons which totaled up to their unpreparedness.

6. The Defendants filed their joint statements of defence alongside their documents on the 27th August 2013 in which they denied the contents of the plaint herein.

7. On the 17th September 2013, the Plaintiffs were granted leave to file their reply to the defence, their list of documents, witnesses and witness statements simultaneously within two weeks with corresponding orders to the Defendants

8. On 3rd December 2013 Counsel for the Defendants sought for a hearing date of the main suit wherein, the court directed parties to file

agreed issues within 7 days and exchange further documents. On 25th February 2015. Parties confirmed to having complied with the provisions of Section 11 of the Civil Procedure Rules wherein the matter was set down for hearing.

9. On the 28th June 2018, the matter was transferred to this court pursuant to its establishment where it was registered with its present number where it proceeded for hearing of the main suit on the 7th February 2019. Before the matter proceeded however, Counsel for the Plaintiff applied orally to amend their plaint, on prayers (b) and (c) as there was a typographical error to read the suit land parcels as No. LR 3777/448, 449 and 451 instead of LR 3779. The application was not opposed by Counsel for the Defendant and was thus allowed.

Plaintiffs' evidence.

10. The 1st Plaintiff witness Michael Waweru Kirubi testified that they had a Company called Malewa Ranching which was land that had belonged to a white man called Brooke. That he had taken possession of the suit land in the year 1970 wherein in the year 1972, he had joined the Company as a shareholder and the directors gave him his share certificate for 10 shares being No 263 herein produced as Pf exh 1, wherein he had paid ksh 100/= per share.

11. That in the year 1974, he had balloted for land at the office of the Company at Malewa Ranch where he had got land No 136. He immediately took possession of the same and built his 5 bedroomed permanent house and proceeded to develop the same by planting trees of all types. Subsequently on the 11th August 2010, he had been issued with the title to the land reference No. Nyandarua/Kipipiri/Lereshwa block 1(Malewa Ranch/136) measuring 5.01 hectares. He produced the title as Pf exhibit 2.

12. That in April 2011, the director Mr. Stephen Nyaga Tibi, Chief Mr. John Nyaga, two of the director's sons, one who is now deceased and the other called John Njenga Tibi as well as two administration police who were armed in the Company of a private surveyor trespassed onto his land and started placing beacons thereon. That indeed Stephen Tibi and his son John had held the surveyor's measuring tape while the other deceased son had a "jembe" – hoe which he used to dig holes and placed the beacons therein. The next day they started fencing the land.

13. Following these activities, he had gone to complain to the District officer 1 in Miharati in Kipipiri but was not successful. He then went to see the District Commissioner who referred him back to the Director's office. That since his complaint was against the Director, he had decided to seek legal advice from Counsel instead.

14. On cross examination the witness testified that he did not know the acreage of the Company's land but that there were about 967 shareholders in the Company. That the surveyor Gatonyi had subdivided the land from the year 1988 -2010. That since he got onto his land in 1972 to date, there were no beacons. When he was referred to an agreement dated the 19th January 1998, he confirmed that the same was between the Company and surveyor Gatonyi. He remained silent when questioned as to whether the sub division had started after the agreement or before, but confirmed that the agreement showed 3 parcels of land and the sub division was to be carried out on parcels No. LR No 3777/448, 3777/449, 3777/451 measuring 2000.7 hectares he also confirmed that Mr. Gatonyi did the sub division.

15. The witness was referred to the minutes of the Company of April 1983, as well as a letters dated the 30th October 2008, 30th April 2009 and 8th January 2010 in the Defendant's list of documents to which he responded that he did not know anything about them.

16. He confirmed that his title deed was issued after the letter of 8th January 2010 wherein its register was opened on 13th January 2010. That the whole of Malewa ranching had no beacons but during the balloting, the directors had placed numbers on a peg wherein he had looked for his number and established his home on that piece of land. That he did not look at the map (RIM) to know the boundaries. He also confirmed that the minutes had been passed according to where persons had built. That a boundary dispute case was not reported to the Land Registrar either. He also confirmed that Stephen the 10th Defendant had also taken part of his land although he was not his neighbor.

17. On Re-examination, he confirmed that he had never seen the agreement between Malewa Ranching and the surveyor Gatome. That since 1974, he had not moved from his land where he had settled. That when the people went on his land they did not show him any paper nor speak to him and it was upon his land that the director had built a house for his son.

18. That at the time they balloted, the land had been divided in classes by Malewa wherein Class A had no stones and people were given 2½ - 3 acres, Class B had a few stones and people were given 6-8 acres whereas Class C had stones where people were given 8 acres. His land was in class C.

19. The Second witness PW2 Wanjiku Gathungu testified that her father Thungu Gathungu was a shareholder with Malewa Ranching, vide share certificate No. 1177 herein produced as Pf exh 3, wherein he had given land after paying money to the white man. That subsequently her father had fallen ill and died in the year 1990. He had left the land to her mother who in turn gave her the Power of Attorney dated the 29th August 2013 herein produced as Pf exh 4, to live on the land.

20. That subsequently when the title deed to Nyandarua/Kipipiri/Lereshwa block 1(Malewa Ranch)/913 herein produced as Pf exh 5 was issued in the year 2010 by the Malewa office, it was in her mother's name Tabitha Wairimu Thuku. On the 15th September 2011, the area chief in the company of Gerald Mburu, John Ndungu, James Maina and Nahashon Kamau in the Company of a private surveyor called Kimani and two administration police officers had showed her a title deed informing her that the land was theirs.

21. That they had then started measuring the plot where they fixed their beacons and left. On the 16th September 2011 she had gone to report to the District Commissioner who was not there. She found the District Officer 1 who had told her to go to the Company offices where she had gone on the 3rd October 2011. The Director had promised to stop those people but did not keep his promise and the people continued disturbing her up to the year 2013 when she sought legal advice. She testified that she had been in possession of the land from the year 1978

to date.

22. On Cross examination, she confirmed that she did not know how the land was sub divided and neither had she seen any documents that showed that the sub division. That she still possessed the title and knew the boundaries which her mother had showed her telling her that they were according to how the surveyor had informed her. She also confirmed that her mother was very old and had never lived on the suit land which was rocky but which she had removed some stones so that she could cultivate.

23. The third witness, Daniel Kariuki Kamau testified that his father Kamau Mwangi Kariuki was a shareholder at Malewa Ranching. That vide his share certificate No. 843 herein produced as Pf exh 6, he was given land by Malewa in the 1972. That his father had then embarked on planting oranges and pyrethrum. After the death of his father in the year 2010, John Mwangi Nyanga and the directors went on his father's land with private surveyors and started sub dividing the same, wherein his neighbor raised alarm.

24. That John Nyanga had reported him to the District Officer where he was summoned and after he had informed the District Officer that the plot No. 894 belonged to his father but that he did not have the title deed, the District Officer had suspected some fraud and had dismissed the case advising the parties to go to court.

25. That after some time, John Mwangi Nyanga had gone to the land and fenced it and had come back with 4 police officers whom he took round the land. That later he had been summoned by the administration police who asked him to go with evidence to show them that the land belonged to his father. He had gathered his neighbors and had gone to the station. That as he was telling the OCS how the land belonged to his father, the chief Mr. John Mwangi Nyanga removed a title deed to plot No. 892. The OCS then warned him to keep off the land.

26. Later him in the company of his brother and step mother went to the District Commissioner where his mother reported the Chief John Mwangi Nyanga of land grabbing. The next day, armed persons had gone to the land and had started shooting at his mother with arrows. Luckily his mother had escaped. He confirmed that he was still on the land and sought that the court cancels the Chief's title.

27. On cross examination, the witness testified although he had nothing from court to show, he and his mother were the administrators to his father's property, there was a Succession Cause still pending at the Nyahuru Law Court. That he knew Eunice Nduta Njugua (the 5th Plaintiff) as well as Tabitha. When he was referred to a title deed for 5th Plaintiff, he stated that before his father died, he had not been issued with a title to Plot No. 894 and that it was not true that plot Nos 893-994 were his parcels of land. That he had a share certificate and receipts to prove that his father was a shareholder. That his father was shown the boundaries by the directors not the surveyor and that he did not know when the official sub division was done and how much land was excised from his father's land. That John Nyanga had title to parcel No 892.

28. That when his mother was attacked, they had been the ones who had been arrested and charged with arson and assault in the Naivasha law court.

29. The Plaintiff closed its case wherein the Defence called their first witness DW 1, Joseph Kamau Kimani who testified that he was a shareholder in the Malewa Ranching Company having bought his 1st share in 1986. That he became a Director of the Company on 1st November 1994 and was re-elected on 23rd March 2012 where he still held his position as the Director to date.

30. He gave a history of the Company in that it was bought by individuals in the year 1970 from a white settler called 'Block'. That the said 'Block' had 3 titles being LR. 377/448, 449, and 541 which parcels of land were at the same place and measured about 5,000 acres. That there was another land No. 415 but they did not get it.

31. That Malewa Company was a private land buying Company. When he was elected in the year 1984, he was instructed by shareholders, in an Annual General Meeting, to subdivide the 3 parcels of land being 448, 449 and 451 but not to touch plot No.415. That he had then drawn an agreement with a surveyor called Gatome and Associates on 19th January 1998 whereby he had started subdividing the 3 parcels.

32. That when the Company was formed in 1970, people had started living on the land before it had been officially demarcated. That initially, they used to rear cattle on the 3 parcels of land. In the 1980's the cattle finished and members sought to subdivide the land.

33. In the year 1983, members resolved to subdivide the land according to classification of soil; being:

- i. Class A was a more fertile area
- ii. Class B had marram
- iii. Class C had stones

34. It was decided that;

- i. Class A, members would get 3 acres.
- ii. People of class B would get 3 -4 acres.
- iii. People of class C would get 5 – 6 acres.

35. The surveyor finished his work and it was submitted to survey of Kenya where the original title deeds were returned to Ardhi House Nairobi. He produced the surrender of title No. 3777/451, 3777/449 and 377/448, as Df exh 1 (a – c). That after surrendering the titles they were given the physical planning herein produced as Df exh 2 (a), and 4 sheets of the Registry Index Map (RIM) herein produced as Df exh 2 (b – d) as well as an area list from No. 1 – 1197, herein produced as Df exh 3.
36. That vide a letter dated the 30th October 2008 herein produced as Df exh 5, the Director of Surveys had informed their the surveyor of the availability of the RIM, which would cost Kshs. 311,310/=, monies which they had paid.- so as to secure the RIM. That they had then forwarded the RIM and the area list to the Commissioner of lands vide a letter dated the 30th April 2009, herein produced as Df exh 6, where they were given a letter dated 8th January 2010, herein produced as Df exh 4, to give to the Registrar of titles at Nyahururu. The letter directed the Land Registrar to open Green Cards.
37. The Green Cards were opened, and they started transferring the parcels of land to their respective owners from whom they had requested for pin number, ID cards, and passport sized photo as well as money to process the title deed. Most of the people were living on their respective parcels of land.
38. That at the time of the subdivision, the surveyor was to identify where people were staying wherein he would measure the land accordingly. That they had summoned people to confirm where their land was wherein the surveyor had allocated them the correct parcels of land. The parcels of land had been divided into blocks being block 1–7.
39. There were 8 directors who represented each block. These directors were expected to know where everybody resided in respect to the map. Where somebody knew where their parcel number was, they would fill the transfer form. Once somebody was satisfied both on the ground and map, they then went to the office to fill the forms which were then forwarded to the registrar to issue title deeds.
40. That the first title deeds were issued in the year 2010. That there was no other survey conducted thereafter or subsequent subdivisions conducted. That the titles were being issued to date for people who had not received theirs. That so far, they had issued title deeds exceeding 1000 in number.
41. The witness also testified that there had been a time when there was a complaint to the National Land Commission (NLC) to the effect that the land had not been fairly issued. That after the NLC heard the two parties, they had been issued with a letter dated the 9th July 2013 herein produced as Df Exh 7, clearing them and directing the to proceed with the issuance of the title deeds.
42. That they had followed the law and used lawful legal means to subdivide the land. That persons who are complaining had their title deeds. That most of the complainants were using private surveyors to go and identify their lands, surveyors who ought to pass through the district surveyor to authorize them in regard to the confirmation of RIM so that the registrar of titles could issue title deeds.
43. It was his further testimony that after their surveyor had finished his work, he had asked his people to show the members where their beacons were, many of who refused claiming that that the surveyor was fake. The surveyor's survey has not been challenged to date. He confirmed that he too had a title deed to parcel No. 256. That the Plaintiffs also had their title deeds which the Company had no issues with and had never interfered with their titles.
44. That most of the Plaintiffs were ignorant and did not want to know the size of their parcels of land. That the titles had indicated the measures in hectares and since most of them know measurements in acres, they believed that they had been cheated off their land. He gave an example of Plaintiff No. 7 whose title deed was No. 120, and wherein he was given 4.98 hectares land if converted into acres, would be about 12 acres. According to the minutes, he was to be given 7 acres, he therefore felt that that he had been denied 3 acres because he thinks 4.98 hectares is the equivalent of acres.
45. When the witness was referred to the titles on the list of document No. 2 – 10, he confirmed that the titles were processed through their office. He produced the copies of the titles as Df exh 8 (a – j).
46. In Cross – Examination, the witness confirmed that he was member of Malewa Ranching with a share certificate, having bought his share from one Henry Kinyua Mwangi. That his Plot was No. 256. That in the year 1983 he was not a shareholder.
47. That after he bought Henry's shares, they had gone to the advocate who wrote a letter to the Company. The share certificate was not issued at that time as Henry's share certificate was withheld by Mwangi and Bells who were the Company's auditors so that the witness could be given new shares by the Company. At the time, the Company had ceased and was not transacting.
48. That he had later gone to the Registrar of Companies were he took his documents and made the payments before become a shareholder. That when he became a director in 1984, the land was being subdivided the shareholding were 1043 which is the number to date.
49. He confirmed that in 1994, the Company had instructed him to subdivide the land and issue title deeds so as to solve disputes relating to the land. That there were to be 37 public utilities on the land. When Counsel took the witness through the public utilities in his statement, he confirmed that they totaled to 37 wherein the 1st meeting had authorized 22 utilities. The witness testified that he could not remember when they had decided on the public utilities.
50. He was then shown a copy of meeting held on the 19th July 1983 wherein he responded that the minutes did not resemble the one in his witness statement as the same was to the effect that there were to be 20 public utilities. That if there were 1043 shareholders and the utilities were to be 20, the total parcels of land ought to be 1063. The shares of Malewa were 1043 and were divided against dividends.
51. It was his evidence that according to the minutes of the year 1983, people who were to get 3 acres, got either 1 or 2 acres. That according

to the classification of the land into A, B, C, there were people who got bigger parcels of land but they did not add people. That persons in 1043 got land elsewhere because the land was small. He confirmed that all the Defendants 1 – 12 were genuine shareholders, who have valid titles. That when the case was filed they did not give them their title deeds but if called upon, they could produce their documents.

52. He further stated that the minutes that dealt with the issue of subdivision were the minutes of July 1993. And when he was referred to Df Exh 1 (a – c), he confirmed having got the documents from the District Officers office. He also confirmed that they had no dates. That the surrender was made by the land registrar but that there was no stamp on the documents to show receipt of the same.

53. He also confirmed that the land was mixed but they had gone to every house. That around the year 2000 – 2002 when the surveyor went with his people, people whom the people on the ground knew, the chief and the police were not present.

54. He stated that his plot was in classification C. That the problem with Plaintiff No. 7, who was also in class C, was that she could not differentiate between hectares and acres. That the Plaintiffs had formed groups wherein they had embarked on destroying people's fences and crops with the result that the owners of the destroyed properties had reported them. He could not however remember whom among the Plaintiffs' were charged although the complainant was present in court.

55. In re-examination, the witness confirmed that the number of public utilities increased from 20 to 37 because the district development commissioner (DDC), led by the area chief were the people who had suggested that there be an increase in other public utilities which had not been factored initially. The shareholders did not object because the utilities were to be used by the public. He also stated that the increment was because the shares were the end year dividend in relation to 1043 shares. That there were 150 shareholders who had less than 3 acres, the classification of land affected the increments of parcels of land and where there was an increase in land, it was added to persons who had less than 3 acres.

56. DW2, Stephen Tibi Njenga testified that he was given land by the Company based on his father's membership No. 32. He was elected as a director and re-elected in the year 2012. He confirmed that the Company had 3 parcels of land being No. 3777/451, 449, and 448 measuring about 5000 acres. That when they started living on about 2 acres of the land in 1973, the same was unsurveyed land, without boundaries and titles. In the year 1983, there was a resolution that the parcel of land be subdivided where they got Gatome and Associates to survey the land and subdivide so that we could get title deeds. The land was measured according to where each person lived, it was called 'picking'. Minutes of meeting were used for classification of the land into class A, B and C. There were public utilities, of which he remembered about 40. People however wanted additional public utilities. After survey was done and the RIM was produced, people were shown their respective beacons. There were transfers conducted according to where people lived wherein they were issued with titles.

57. That initially they had tried to subdivide the land but it did not work until after Gatome's subdivision where things seemed to work. After giving people their titles, they did not interfere with their land. As a Company, they followed all the legal process to subdivide the land. Most of the Plaintiffs have their titles for example:

- i. 1st, 2nd Plaintiff's husband has a title.
- ii. 3rd Plaintiff has no title because the land is family land.
- iii. 4th Plaintiff is not a member.
- iv. 5th Plaintiff is deceased but the title is in her name and she had been issued.
- v. 6th Plaintiff – the land belongs to the family and the title is registered in 3 names.
- vi. 7th Plaintiff has her title.
- vii. 8th Plaintiff – the title is in her husband's name. He is deceased.

58. That as directors, they could not interfere with the Plaintiff's titles because they had been issued the same by the Government. The 1st Plaintiff had a big land No. 136 wherein the surveyor had gone to him to identify the beacon and that he had never interfered with the said land.

59. In cross-examination, he confirmed that there were minutes of the year 1983 upon which they had decided to include the public utilities. He also confirmed that the shareholders were 1043 herein the utilities were 37. That from 1043, some shareholders did not have land. That he had land on plot No. 115 measuring 4 acres in class B, which he had been given by his father who was member No. 432.

60. That between the 1st Plaintiff's and another person, there was land that had been vacant which land he had bought and registered it in his wife's name which in turn caused a rift between him and the 1st Plaintiff.

61. He also confirmed that in the year 2011 the people had been notified through meetings that a surveyor would visit to inspect the land. That the 2nd Plaintiff's land Plot No. 119 had been reduced because it was more than 20 acres. She was given 12 acres. That it had been the surveyor and not the directors who had picked the parcels of land.

62. In re-examination, he reiterated that 2nd Plaintiff had more than 20 acres before the official subdivision. Her classification was class C where she was to get 6 – 7 acres hence the reduction of the acres was because of classification. He was not deprived off the land.

63. At the close of the Defendant's case parties filed their written submission to which I shall summarize as follows:

Plaintiff's written submission.

64. The Plaintiffs herein filed suit on 25th July 2013 in their capacity as shareholders of Malewa Ranching Company Ltd which was the registered and beneficial owner of the suit land known as No. 3777/448, 3777/449 and 3777/451. That the land had been allocated to the shareholders by virtue of a survey agreement of 19th January 1998 where it was agreed that the land measuring approximately 5000 acres was to be surveyed and subdivided into 1043 agricultural portions to reflect the number of shareholders and several public utilities.

65. Vide a board meeting of 19th July 1998 the land was classified into three categories, class A, the which had no rocks, class B which was semi rocky and class C which was largely rocky. It was agreed that the various categories would get 3 acres, 4 acres, and between 5 to 6 acres respectively.

66. The said subdivision was done and a total of 1065 plots were hived out of the original land where the Plaintiffs who took possession and occupied the same. Sometimes between the years of 1998 to 2010 the Defendants without color of right to trespassed into the Plaintiffs land and caused illegal subdivisions and adjudication hereby destroying crops and erecting beacons without the Plaintiffs' consent which led to the filing of the present suit.

67. The plaintiff framed their matters for determination as follows;

- i. Whether the survey agreement entered on 19th January 1998 was the working document to during the sub-division of the land owned by the Malewa Ranching Company Ltd.
- ii. Whether the Defendants and directors of the Malewa Ranching Co. Ltd fraudulently deviated from the agreed pattern of sharing the 1043 plots and awarded non shareholders orders parcels of land already held by the shareholders.
- iii. Whether the acts of the defendant to amount to trespass and whether the excision and alienation of the land held by the Defendants was lawful and/ or justified.
- iv. Whether the Plaintiffs have suffered loss and injury and are entitled to the prayers sought in the plaint.

68. On the first issue for determination it was the Plaintiffs submission, that after the incorporation of Malewa Ranching Co Ltd on the 21st December 1970, vide a meeting of the 25th of April 1983 and 19th July 1983, by the Board of Directors, it was agreed that there a subdivision of the land No. 3777/448, 3777/449 and 3777/451 to 1043 agricultural plots to its shareholders and to include several public utilities which included 2 primary schools, 1 secondary school, 2 cattle dips, 1 major town, 1 small town, 4 water reservoirs and 1 village polytechnic making a total of 20 public utilities.

69. It was agreed that a total 1062 plots be hived off from the suit property to cater for the agricultural plots for all the 1043 shareholders together with 20 public utilities. The land was further classified into class A, B and C.

70. By virtue of the meeting, a survey agreement was entered into on the 19th January 1998 between Malewa Ranching Company and Gatome and Associates to survey the whole parcel of land and vary potential agricultural land, placing beacons at the corners of each plot to create boundaries for plot owners.

71. The subdivision was done where parties were shown their parcels of land wherein they took possession thereafter. It is the Plaintiffs submission that no other meetings were held apart from the meetings of 25th of April 1983 and 19th July 1983 that had informed the survey agreement which was a working document used to sub-divide No. 3777/448, 3777/449 and 3777/451 .

72. On the second issue, the Plaintiff's submission was that from the evidence adduced by DW1 and DW2, 1197 plots were hived off instead of the agreed 1063 plots wherein some of the shareholders got less than 2 acres and therefore further sub divisions had to be done to cater for the people who had less land and further, that 37 public utilities were hived off. There was no documentation provided to show that the Directors had passed a resolution to reduce the acreage of shareholders who had less than 2 acres keeping in mind that the decision on classification and acreage had already been made and no member was to have less than 2 acres.

73. The Plaintiffs in asserting that the Defendants failed to prove that there had been another Directors meeting that authorized them to increase public utilities to 37 instead of 20 as agreed upon, relied on the provisions of Sections 107 and 108 of the Evidence Act.

74. That the evidence adduced by the Plaintiffs to the effect that the Defendant herein entered upon their land sometime on or about the 15th September 2011 was not denied by the Defendants who conceded that they had entered upon these parcels of land to subdivide them so as to accommodate members who had fewer than 2 acres. What the Defendants did not tell the court was that the sub division was so that they could allocate the land to non-shareholders. It was therefore the Plaintiff submission that the Defendants fraudulently deviated from the agreed pattern of sharing and awarded non shareholders parcels of land in the name of public utilities.

75. The Plaintiff in their submission on the 5th matter for determination, were categorical that by the defendant's action of going onto their parcels of land sometime in the year 2010 and causing wanton destruction of property and crops thereby erecting beacons thereon amounted to an act of trespass as per the definition of the 10th Edition of Black's Law Dictionary and therefore the excision and alienation of the Plaintiffs parcels of land by the Defendants herein was unlawful and unjustified.

76. On the issues as to whether the Plaintiffs had suffered loss and injury and whether they were entitled to the prayers sought, it was their submission while relying on the case of **Vincent Koskei vs Bernard Koske [2018] eKLR** and the celebrated case of **Cassman Brown & Company Ltd 1973 EA 358** that indeed they had established a prima facie case to the effect that they had demonstrated that they were the absolute and indefeasible proprietors of the suit land in which they resided upon by virtue of being shareholders of Malewa Ranching Company Ltd. That the Defendants failed to prove ownership of the suit land and therefore were trespassers to the said suit land.

Defendant's Submission.

77. The Defendants considered the prayers sought by the Plaintiff in their plaint to submit that the Plaintiffs main issue was that the Defendants had contravened the Company's resolutions and the survey Agreement by ignoring the shareholding pattern and crafted minutes which led to the increment of shares, which shares were awarded to strangers and where further allocations made in respect of land that had already been held by the shareholders leading to further sub divisions of their land and issuance of new titles which in turn led to evictions of shareholders from their respective parcels of land. That the Plaintiffs had also taken issue with the subsequent title deeds where they had pleaded that the same were null and void. Allegations which the Defendants denied in toto.

78. It was the Defendants submission that although it was trite law that parties are bound by their pleadings, yet the Plaintiffs in their testimony steered away from their pleadings. That whereas in their Plaint the Plaintiffs had sought to know how parcel No LR 3777/448, 449, and 451 had been sub divided and allocated to members of Malewa Ranching Company, they had pleaded that the said land had been sub divided a second time and sought that the subsequent titles be declared null and void and the public utilities be recovered from the Defendants.

79. The Plaintiffs did not adduce any evidence to support their pleadings that the titles be declared null and void, but instead came up with their own prayers. They relied on the case of **Stephen Ndolo Wambua vs Beatrice Mbula Mutilu & 2 others [2019] eKLR** to buttress their submission.

80. The Defendants further submitted that the Company followed that laid down procedure when it had land parcels No. LR 3777/448, 449, and 451 sub divided and later distributed them to the rightful shareholders. That through the chronology given during their testimony, the Defendants proved that they had followed the laid don procedures which were approved by the relevant authorities including the National Land Commission which approved the sub division.

81. That from the evidence adduced by the Plaintiffs, that none of them had sought the services of a surveyor to point out beacons to their respective parcels of land, further they had not lodged any boundary dispute and did not have evidence of the parcels of land that had been hived off from their respective land. They therefore had no cause of action against the Defendants.

82. Other than the sub divisions by Gatome and Associates, the Plaintiffs were not able to adduce any evidence of a subsequent sub division, prove the allocation of the hived of parcels of land to strangers or prove that the Defendants illegally allocated themselves parcels of land. That since the Plaintiffs failed to prove their respective claims on a balance of probabilities, their suit ought to be dismissed.

Analyses and determination.

83. Before I proceed on analyzing the evidence and determining this matter it is worth noting that pursuant to effecting service upon the defendant herein, only the 1st, 8th, 10th, 11th and 12th Defendants filed their response and defence as well as their submissions.

84. I have considered the evidence adduced in court as well as the submissions thereafter by both parties. I have also considered the authorities herein annexed.

85. Indeed this suit was filed by 8 Plaintiffs seeking orders as enumerated at the beginning of this judgment. Out of the 8 Plaintiffs only 3 of them testified as a representation since their grievance was similar.

86. From the evidence adduced, the Plaintiffs' case is hinged on the fact that they were shareholders of Malewa Ranching Company Ltd, either by themselves or through their parents. That by virtue of their shares they had balloted and/or had been issued parcels of land respectively wherein they had settled therein as early as the year 1972. The Plaintiffs admitted that by the time they were settling on their respective parcels of land, the same was not surveyed and had no boundaries but had been divided in classes wherein Class A had no stones and people were given 2½ - 3 acres, Class B had a few stones and people were given 6-8 acres whereas Class C had stones where people were given 8 acres onward and which land he was given and which land one could mine stones.

87. Subsequently they had been issued with the title to their land but sometime in the year 2011, their parcels of land had been invaded by the directors of Malewa Ranching Company Ltd some of the Defendants herein who were in the Company of the area chief, a surveyor Mr. Gatome and administration police officers.

88. That these people proceeded to place beacons on the Plaintiffs' respective parcels of land thus hiving off part of their land in the process. That the Defendants' actions consisted of acts of trespass on the Plaintiffs' parcels of land with the sole aim of allocating the land to non-shareholders. The Plaintiffs confirmed that they had neither sought for a boundary dispute resolution nor an independent survey.

89. The Defendants case on the other hand was that Malewa Company was a private land buying Company formed in 1970. It had 3 parcels of land being No. 3777/448, 449, and 451 measuring about 5000 acres. That when they started living on the land in 1973, they used to rare cattle on the 3 parcels of land which were neither surveyed nor had boundaries and titles In the 1980's the cattle finished and members sought to subdivide the land. In the year 1983, shareholders, in an Annual General Meeting, passed a resolution that the land be subdivided according to classification of soil being:

i. Class A was a more fertile area

ii. Class B had murrum

iii. Class C had stones

90. It was further decided that;

i. Class A, members would get 3 acres.

ii. People of class B would get 3 -4 acres.

iii. People of class C would get 5 – 6 acres.

91. They had sourced a surveyor wherein vide an agreement dated the 19th January 1998, the firm of Gatome and Associates was to survey the land and subdivide parcels No. 448, 449 and 451. The surveyor finished his work and it was submitted to survey of Kenya where the original title deeds were surrendered to Ardhi House Nairobi where they were given the physical planning and 4 sheets of the Registry Index Map (RIM) as well as an area list from No. 1 – 1197. That they had then forwarded the RIM and the area list to the Commissioner of lands vide a letter dated the 30th April 2009, where they were given a letter dated 8th January 2010, give to the registrar of titles at Nyahururu which letter sought that the Land Registrar opens green cards.

92. The green cards were opened, and they started transferring the land to the respective owners from whom they had requested for pin number, ID cards, and passport sized photo as well as money to process the title deed. Most of the people were living on their respective parcels of land. That at the time of the subdivision, the surveyor identified where people lived before measuring the land accordingly. That the people had been alerted of the exercise in advance.

93. Having laid down the background of the case, I find the matter for determination as follows:

i. Whether the Plaintiffs' suit discloses a reasonable cause of action against the Defendants.

ii. Whether the Plaintiffs have proved their case on a balance of probabilities and whether they are entitled to the reliefs sought?

94. In their pleadings, the Plaintiffs sought to have the sub divisions and alienation of the land parcels originally known as Malewa Ranching Company declared null and void and the Defendants be injunctioned permanently from dealing with the same.

95. It is my duty to now consider the merits of the same while placing reliance on both the documentary and oral the evidence adduced in court at the hearing. This evidence, I find, disclosed the following issues that were not contested.

i. That by the time the shareholders took possession of their respective parcels of land as farms, in the early years of 1970, the land had no boundaries and titles because it was not surveyed.

ii. That vide Minutes of the Annual General meetings of the 25th of April 1983 and the Board of Directors meeting of 19th July 1983 respectively, it was resolved that the Company farms No. 3777/448, 3777/449 and 3777/451 be subdivided to 1043 plots and 20 public utility plots

iii. Further, it had also been resolved that all the existing boundaries ceased to exist, and the surveyor to preserve as much as possible the existing houses while subdividing the plots which were classified according to their varying agricultural potential.

iv. It was based these resolutions that the 13th Respondent was contracted by the Malewa Ranching Company and on the 19th January 1998 both parties entered into an agreement to subdivide the plots which were to be registered under the provision of the Registered Land Act.

v. Indeed the Agreement was executed wherein the surveyor conducted his sub divisions and submitted his subdivisions to the survey of Kenya. The original title deeds were also surrendered to Ardhi House Nairobi.

vi. That subsequently the Company received the physical planning and 4 sheets of the Registry Index Map (RIM) as well as an area list for No. 1 – 1197.

vii. The RIM and the area list were forwarded to the Commissioner of lands who gave an approval letter to the registrar of titles at Nyahururu to issue titles and this was done.

96. From the sequence of events I am satisfied that the procedure used to subdivide the Company's parcels of land was legal and therefor the Plaintiff's prayer fails.

97. The Plaintiff's claim during the hearing was that officials of the Malewa Ranching Company had trespassed onto their respective parcels land and fraudulently allocated themselves the same.

98. Having testified that there was fraud and illegality on the part of the Defendants in the manner in which they trespassed and alienated to themselves the suit land, the onus was on the Plaintiffs to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

99. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

100. I find that no independent evidence for example from a surveyor, was adduced to support these claims that indeed the Defendants trespassed onto the Plaintiffs parcels of land and taken possession therein.

101. Secondly I find that this line of evidence was in variance with their pleadings where they had sought to have the sub divisions and alienation of the land parcels originally Known as Malewa Ranching Company declared null and void wherein the Defendants be enjoined permanently from dealing with the same.

102. **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

..In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

103. Going back to the pleadings and the evidence in this matter, the evidence tendered by the Plaintiffs did not support the pleadings. I find that via a resolution passed Minutes of the Annual General meetings of the 25th of April 1983 and the Board of Directors meeting of 19th July 1983 respectively, it was resolved that the Company farms No. 3777/448, 3777/449 and 3777/451 be subdivided to member shareholders which was done legally and the land Registrar proceeded to open new registers for each of the subdivisions.

104. In conclusion, I find that the Plaintiffs have failed to prove their case on a balance of probabilities. I hold that the subdivisions carried out in respect of Malewa Ranching Ltd LR No.3777/448, 3777/449 and 3777/451 creating subtitles was validly and procedurally carried out. The Plaintiffs are not entitled to any of the reliefs sought in the plaint and their suit is hereby ordered dismissed with costs to the 1st, 8th, 10th, 11th, and 12th Defendants herein.

Dated and delivered at Nyahururu this 22nd day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE