



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA NO. 2 OF 2018

LOLWE HOUSING COOPERATIVE SOCIETY LTDAPPELLANT

VERSUS

EMILY OMOLE.....RESPONDENT

JUDGMENT

The Appellant has appealed against the judgment of the Cooperative Tribunal in Cooperative Tribunal Claim No. 13 of 2013 delivered on 15th December 2014, on the grounds that the Tribunal erred in law and in fact in

- 1. Holding that the Respondent was a fully registered member entitled to all the rights of a fully paid up member despite evidence to the contrary.**
- 2. Holding that the Respondent was entitled to a piece of land despite failing to comply with the various resolutions passed during the AGMs.**
- 3. Holding that the Respondent suffered damages totalling Kshs. 500,000/=.**
- 4. Holding that the acquisition of a parcel by the Respondent was a one-off affair and that once a member had paid membership fees in the 1980s, he or she was entitled to a parcel of land worth millions of shillings 30 years later without complying with resolutions of at the AGMs.**
- 5. Holding that the Respondent was a member of the Appellant Society.**
- 6. Disregarding the recommendation of inquiry report order under the directive of the Commissioner of Cooperatives and adopted by members in the Special AGM of 27th November 2010.**
- 7. Totally disregarding the Appellant's evidence.**

The facts herein are that the Respondent brought a claim before the Cooperative Tribunal, claiming to be a member of the Appellant Society and that she was allocated Plot No. 44 by the Appellant at its housing scheme in Lolwe Estate Kisumu. That she had bought 150 shares of Kshs. 20 each with the Appellant in May 1987 and was issued with a share certificate and allocated the Plot No. 44. That she later learned that the Appellant had unlawfully allotted and transferred the plot to a 3rd party without her knowledge or consent. That the Appellant failed or neglected to return the plot or shares to her. The Respondent prayed for judgment for an declaration that the plot belongs to her and the allocation to a 3rd party was unlawful; for compensation for the fair and just price thereof or a separate plot be allocated to her; damages; and interest.

In its defence, the Appellant stated that if the Respondent was ever a member then her name was removed for failing to comply with society rules and regulations. That owning a share certificate in itself with a plot number did not amount to owning a plot, as requisite fees and procedures must be followed including resolutions passed at the AGMs before one could be issued a title deed.

In its award, the Tribunal found that the Respondent had proven on a balance of probabilities that Plot No. 44 belonged to her; that the subsequent re-allocation to a 3rd party was through unlawful and dishonest means, and that the Respondent was entitled to compensation with another similar plot or equivalent value at current market rates and damages of Kshs. 500,000.

Counsel for the appellant submitted that the even though the Respondent was issued with a share certificate, she had not fully paid up for her shares and therefore could not be considered a member of the Appellant or exercise any rights as a member according to Sections 17 and 22 of the Cooperatives Societies Act. That the Respondent did not produce any evidence that she bought 150 shares at Kshs. 20/= each, but only produced one receipt dated 19th April 1991 that was for plot rent, penalty survey and title deed part payment.

Counsel submitted that given the Respondent had only attended two meetings of the Appellant before the share certificate was issued, it was highly in doubt that the Respondent was a member. That there was no notice of subsequent meetings specifically addressed to her and the ones she had presented were addressed to other persons.

Counsel submitted that following the AGM of 8th September 2007, members were to pay unpaid bills of up to Kshs. 40,000/= so that the titles could be processed and that there was to be harmonization of records of members and their plots by October that year. That in the AGM of 21st March 2009, members were reminded on the need of harmonization of records through filling a form and submitting their documents including receipts, balloting cards and share certificates. That there was an SGM on 27th November 2010 which made a resolution that all members were given 3 months to clear their balances and in default, the members would be expelled and the plots repossessed. That the Respondent neither attended any of these meetings nor did she comply with the resolutions, and she did not dispute her knowledge of the occurrence of these meetings.

Counsel contended that share certificate and ballot card could not be considered as evidence of ownership of the plot, but were merely evidence of ownership of shares. That none of the legal procedures effecting transfer of the plot from the Appellant to the Respondent was proven to have taken place. That even the third party to whom the plot was sold to paid a particular purchase price despite owning fully paid up shares in the Appellant. Counsel also pointed out that the Appellant brought her claim in 2013, 10 years after the plot was sold to the third party, demonstrating the Respondent's indolence.

Counsel submitted that the Tribunal erred in finding that the Appellant had breached its fiduciary duty to the Respondent, but rather it was the Appellant who was not vigilant and was indolent in exercising her rights, if any. That the Appellant was not keen in participating in the Appellant's activities to enable her keep track of the changes the Appellant was undergoing and therefore was not entitled to the damages awarded.

Issues for Determination

Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

1. *Whether the Tribunal erred in holding that the plot was properly allocated to the Respondent as a paid up member*

Section 17 of the Cooperative Societies Act provides that:

“No member of a co-operative society shall exercise any of the rights a member unless he has made such payment to the society in respect of membership, or has acquired such interest in the society as may be prescribed under this Act or under the by-laws of the society.”

Rule 13 (2) of the Cooperative Societies Rules, 2004 prescribes the mandatory keeping of a register of members of the society. The register acts a reference when determining a member's interest in the society as provided for in **Section 40 of the Cooperative Societies Act** thus:

“Any register or list of members or of shares which is kept by a co-operative society shall be *prima facie* evidence of any of the following particulars entered therein—

(a) the date on which the name of any person was entered in such register or list, as a member;

(b) the date on which any such person ceased to be a member; and

(c) the number of shares held by any member.”

The Tribunal held that the Appellant did not challenge the authenticity of the Respondent's share certificate, and had not explained how the Respondent was allowed to ballot and was issued with a share certificate if she had not paid for the same in full:

“The common practice is that any member who has not paid for a plot in full cannot be allowed to ballot for a plot as such cannot be issued with a share certificate for the same... The share certificate issued to the Claimant on 10th May 1987 is clear that [s]he was the owner of one hundred and fifty shares which had been paid for in full at twenty shillings each.”

The allocation of plots in this case is linked to membership in the society and their acquisition of shares. The Respondent presented a copy of her share certificate and balloting card showing she fully paid for 150 shares and was allocated Plot 44. The Appellant also filed a copy of a receipt showing payment of plot rent, penalty survey fees, and what seems to be part payment for title deed. These documents have not been

disputed by the Appellant. Instead, the Appellant's claim is that the Respondent was once a member but did not comply with the society rules as to payments to enable it to process her title, and therefore it allotted the plot to a third party.

In order to show that the Respondent ceased to be a member and did not comply with rules for payments, the Appellant would have had to present its member register indicating the Respondent's interest including when and why she ceased to be a member. Despite pleading that it had gone through its records, the Appellant failed to file any of the relevant records, including the member register. The reason for this becomes apparent on examination of the Inquiry Report into the Appellant's affairs.

The Inquiry Report revealed that the Appellant's former secretary, Gabriel Otieno Nyabinge alleged that the member register got lost in 2001 yet he failed to report the loss and continued to run the affairs of the society until 2005 without the register (p.13):

“The Hon. Secretary could not explain how in the absence of the register he could tell which plots had been sold and which ones had not been not [sic],.... Moreover, how were correspondences made in the absence of the register?”

The Inquiry Report also revealed how the alleged absence of the register worked to the former secretary's advantage when he fraudulently and irregularly sold and misappropriated numerous plots, including selling Plot 44 to the third party (p.28).

The Inquiry Report indicated that following the annual general meeting of 1990, members were to pay their balances by 7th December 1990 failure to which the affected member would be expelled and their plots repossessed. The report noted that a list of affected members was compiled by the former secretary but he did not indicate the plot numbers affected with intent to gain personally. That in absence of the original member register and inadequate records, it was impossible to identify the affected plots (p.43).

In the minutes of the AGM of 2007, the secretary taking over from Gabriel Nyabinge stated that Mr. Nyabinge did not hand over the original member register but instead gave him “some names on a piece of paper” which was used to reconstruct a register. While there was a resolution that members forward their details for harmonization of the register, the minutes of the AGM of 2009 revealed that the harmonization was yet to be completed.

It is evident that due to the extensive interference with the original member register and other records dealing with the allocation, transfer and repossession of the plots from 1980 - 2005, the Appellant does not seem to have any accurate records of members' interests after the balloting for plots was done; or records of members' status of payment of dues. The register having been compromised, it is also unclear how the Appellant corresponded with its members to ensure that each member was given notice of meetings and that each member was sent important circulars.

The apparent lack of proper records is probably the reason why the Appellant failed to file a register of its members and relevant records indicating which members had not cleared their dues. It did not file any evidence to show that the harmonization of the members register had been completed and a final register of members compiled. It led no evidence to prove that the Respondent ceased to be a member, including why and when she ceased to be a member.

Therefore, the Tribunal did not err in holding that, on this issue, the Respondent had proved her case against the Appellant on the balance of probability.

2. Whether the Tribunal erred in holding that the Appellant had breached its fiduciary duty to the Respondent

The Appellant owed a fiduciary duty to its members to keep a proper register of members and their interests. It also owed a fiduciary duty to its members to keep proper records and books of account relating to its dealings with allocated plots. The totality of the evidence demonstrates a clear failure by the Appellant in its duties. The failure resulted in the Appellant's former secretary fraudulently selling the suit property to a third party in the name of the Appellant and at the expense of the Respondent. The Tribunal finding of a breach of trust is therefore correct.

3. Appropriate reliefs

The upshot of the above is that the appeal is dismissed and the award of the Tribunal is upheld. Costs to the respondent.

DATED AND DELIVERED THIS 13th DAY OF **DECEMBER, 2019.**

In the presence of:

Rr Orieyo for respondent

N/A FOR APPELLANT

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE