



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 160 OF 2015**

**PETER ELIMA NYUKURI.....1<sup>ST</sup> PLAINTIFF**

**DAVID NYONGESA WAMALWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LEONARD KINGASIA OMOCHAR.....1<sup>ST</sup> DEFENDANT**

**KENNEDY SIMIYU SITOKO.....2<sup>ND</sup> DEFENDANT**

**PROTUS SIMIYU MUNIALO.....3<sup>RD</sup> DEFENDANT**

**ANDREW BOAZ JUMA.....4<sup>TH</sup> DEFENDANT**

**MOURICE TABALIA.....5<sup>TH</sup> DEFENDANT**

**PATRICK NJOGINDA.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated **31/12/2015** and filed in court on **31/12/2015**, the plaintiffs sought the following orders against the defendants:-

**(1) That the defendants be ordered to surrender 4.3 acres from the land LR No. 8994/30 and 8994/29 according to their shares which they paid for.**

**(2) Costs of this suit.**

2. On **30/10/2018** when this matter come up for hearing none of the parties was present and the matter was dismissed. The plaintiffs filed an application dated **21/11/2019** for reinstatement of the suit. Ruling was delivered on **28/2/2019** and the matter was reinstated. The court heard the main suit on **16/10/2019** and **6/11/2019**. The suit was not opposed.

3. The suit came up for hearing on **16/10/2019**. **PW1 Peter Nyukuri Elina**, the 1<sup>st</sup> plaintiff gave evidence. **PW2, David Nyongesa Wamalwa** testified on the same date. Thereafter, the plaintiffs' case was closed.

**The Plaintiffs' Case**

4. According to the plaint and the evidence of the plaintiffs the plaintiffs' group merged with the defendants group, both being land buying groups or associations on an equal shares basis; that the defendants sold the plaintiffs portion of land and rendered the plaintiffs landless; that the defendants subdivided the suit lands **LR 8994/30** and **LR 8994/29** and sold some of the lands to non-members and denied the plaintiffs their rightful share.

5. According to the evidence of **PW1**, he and others had entered into joint partnership agreement called Tembelela Self Help Group. He produced a copy of the agreement (**P. Exhibit 1**). Thereafter Tembelela Self Help Group joined hands in a partnership with another association calling itself Mukhuyu Farmers Self Help Group who were already in the process of purchasing the suit land. After the merger, the whole group retained the name "Mukhuyu". Tembelela paid **Kshs.340,000/=** to Mukhuyu; **Kshs. 200,000/=** of this money was transmitted to Mark Simiyu Kisenbe the owner of the land to be purchased. **PW1** produced the original receipt dated **28/4/1997** as **P. Exhibit 2**. The plaintiffs further paid **Kshs.16,000/=** to Mukhuyu in two instalments on **10/6/1997** and **3/1/1998**.

6. According to PW1 the purpose of the amalgamation of the Tembelela and Mukhuyu was to buy land; before the merger, the Mukhuyu group had paid a deposit for the land owned by Mark Simiyu Kitembe, the seller but had failed to complete the payment. Mukhuyu had earlier agreed with Kitembe that they would buy Kitembe's **91 acres** for **Kshs.3,700,000/=** in **1997**. The members of Mukhuyu had paid **Kshs. 3,171,450/=** to Kitembe. After the Tembelela - Mukhuyu union occurred and Kitembe was paid **Kshs.200,000/=** he allowed them to take possession of the land. The balance was **Kshs.156,000/=**. Later on, after the group worked the land, **802** (90kg) bags of maize were harvested from the **41 acres** and sold for **Kshs. 855.03/=** per bag thus realizing **Kshs. 685,950.60**, **Kshs. 500,000/=** of that amount was obtained in November, **1997** from the maize sale proceeds and paid to Mark Simiyu Kitembe. The witness did not know what happened to the balance of the maize sale proceeds which he estimated to be **Kshs.185,000/=**.

7. According to PW1 the officials of Mukhuyu conducted all the agricultural activities and they kept the former Tembelela group members in the dark concerning those operations.

8. Tembelela members paid survey fees **Kshs. 2,700/=** to Mukhuyu and survey work was done but in their absence. After the survey the Tembelela members were directed to certain portions which did not match the sums they had paid.

9. That was not all in **2012** PW1's land was excised and the parcel so excised given to one Andrew Situma. His land which was supposed to be **1.8 acres** was reduced to **0.8 acres**. Andrew got **0.2 acres** from the **0.8 acres**. All this time title deeds had not been issued for the land.

10. **PW1** had also bought **0.5 acres** from a member of Mukhuyu one Peter Wekesa Wakhungu. From that **0.5 acres** the Mukhuyu official excised **0.1 acre** and gave it to **Patrick Joginda**. Mukhuyu members also threatened him and he fled from the farm and he now lives away from his portions. He averred that the title deeds were issued yet no government surveyors came to the land to survey it. He produced the farm produce record **P. Exhibit 3**, area list of Mukhuyu members **P. Exhibit 4**. He testified that Tembelela was comprised of six persons, two of whom are deceased and that the six persons added to Mukhuyu membership gave the combined number of **45 members**. He produced copy of the agreement dated **30/9/2009** as **P. Exhibit 5**. According to PW1 the 2<sup>nd</sup> plaintiff had paid **Kshs.101,000/=**. The whole of the Tembelela group had contributed a total of **Kshs.356,000/=**.

11. PW2 testified that he was chairman of the Tembelela group which he united with the Mukhuyu group and took possession of the land purchased by the union. When the land was finally distributed the six Tembelela members found that they had received less land than they were entitled to and began complaining. When they complained to the CID they were told to await a survey; then in **2012** the Mukhuyu group leaders began selling the land. They complained to the Chief who sent them to the District Officer who sent them to the CID again who sent to Haki Na Amani Organization which did not help them hence this suit.

12. According to him Tembelela members were threatened and so they fled the suit land and came to court to seek justice. According to him Tembelela members are entitled to **4.3 acres** out of the purchased land as that is the equivalent of their monetary contribution towards the purchase of the suit land. PW2 testified that he was allocated **1.4 acres** instead of **3.2 acres**. PW2 produced **P. Exhibit 6**, a copy of an agreement dated **27/10/1997**, the witness testified that the dispute was unsuccessfully dealt with by Risper Arunga, Advocate when she summoned the Chairman of Mukhuyu to her office vide her letter **P. Exhibit 7** dated (6/1/1998). From **P. Exhibit 8** it can be seen that the CID requested the District Officer to resolve the issue. **P. Exhibit 9(a)** and **(b)** show that the plaintiffs applied for registration of caveat over the land. The crop assessment report [**P. Exhibit 14 (a)**] dated **20/11/2012** was produced by PW2 to show that his crops were damaged at the orders of a Mr. Andrew Boaz Juma which name matches that of 4<sup>th</sup> defendant herein.

13. This court ordered the plaintiffs to provide searches to show the current status of **LR Nos. 8994/30** and **8994/29** and their subdivisions if any. The 1<sup>st</sup> plaintiff provided a search **P. Exhibit 15 [Kiminini/Matunda Block 24 (Mukhuyu)/4** measuring **0.39 Ha** in the name of Peter Elima Nyukuri], **P. Exhibit 16 [Kiminini/Matunda Block 24 (Mukhuyu)/30** measuring **0.16 Ha** in the name of Peter Wekesa Wakhungu] and **P. Exhibit 18** in respect of **[Kiminini/Matunda Block 24 (Mukhuyu)/83** measuring **0.52 Ha** in the name of Joseph Wamalwa Nyongesa].

14. PW1 also produced a map (**P. Exhibit 17** for Mukhuyu farm). From that map it is apparent that the same has been subdivided into about **109** portions of different sizes; some of them appear many times larger than others. He asked this court to issue orders to those who would be found to be in illegal occupation of his land to vacate. He prays for damages.

15. The defendants never filed any memorandum of appearance or defence despite being served with summons and plaint and other documents on **8/12/2017** as evidenced by the affidavit of service sworn by one **Patrick Simiyu** sworn on **21/12/2017**.

### **Determination**

16. I have considered the evidence on record as given by the plaintiffs. That evidence was not controverted by the defendants who did not come to court to show that the plaintiff's claim is not genuine. It is my view that the defendants ought to have attended court to give evidence and dispute the allegation that the plaintiffs were shortchanged after the two groups merged; as they did not, the only evidence on record shows that the whole of the Tembelela group had contributed a total of **Kshs.356,000/=** and that all the land to be purchased measured **91 acres**. Simple mathematical calculations put the average cost one acre under the said transaction as **Kshs. 40,659.30/=**. If parties were to be allocated land purely on the basis of the funds they helped raise at the time of the purchase, then the plaintiffs' group having paid **Kshs. 356,000/=** was therefore entitled to approximately **8.75 acres** under the transaction.

17. In their evidence the plaintiffs have demonstrated that they have exhausted all the administrative machinery they could appeal to for the resolution of the dispute but it was not resolved. The land they claim is held by the defendants.

18. This court finds that the plaintiffs' claim has merit; the plaintiffs have established their claim on a balance of probabilities against the defendants.

**CONCLUSION**

19. I therefore enter judgment in favour of the plaintiffs against the defendants jointly and severally and I grant **prayers No. (1) and (2)** in the plaint dated **31/12/2015**.

It is so ordered.

**Dated, signed and delivered at Kitale on this 5<sup>th</sup> day of December, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**5/12/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Plaintiffs in person present

Defendants absent

**COURT**

Judgment read in open court at 2.45 p.m.

**MWANGI NJOROGE**

**JUDGE**

**5/12/2019.**