



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 85 OF 2008**

**RONALD SIMIYU..... PLAINTIFF**

**VERSUS**

**BIKEKE FARMERS CO-OPERATIVE LIMITED..... DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit by way of a plaint dated 16/6/2008 filed on 27/10/2008. He sought the following orders: a declaration that he owns **3 ½ acres** out of the defendant's **Bikeke Farm** and that the defendant be made to provide the **3 ½ acres** for him, costs of this suit and interest thereon.

2. It is plaintiff's case that he is a member of the defendant society and that he owns **Plot No. 411** measuring **3 ½ acres** out of the defendants land parcel **LR No. 6626** otherwise known as **Bikeke Farm**. However, the plaintiff pleads that the Directors and/or Officials of the Society have unlawfully caused new titles to be issued and that they have reduced the plaintiff's share to the **2 acres** now comprised in **LR. No. Waitaluk/Mabonde Block 4/411**.

3. The defendants deny the claim. In a defence dated 10<sup>th</sup> November, 2008 and subsequently amended on 12/10/2016, the defendant averred that the plaintiff bought his land from a third party and therefore there is no privity of contract between the parties herein. The defendant further avers that the plaintiff is in occupation of his land and the dispute between him and a third party one **Jackson Makokha**, was finally adjudicated on in **Kitale High Court Land Case No. 107 of 1996** and a decree issued. A title deed was also issued to the plaintiff for his land and he raised no demur. The parcel measured **0.809 Ha**. Therefore, the defendant pleads that this suit is *Res Judicata*.

4. In his reply to the amended defence the plaintiff accuses the defendant of reducing the **3 ½ acres** which he bought from Jackson Makokha without cause. The plaintiff also admits the existence of **Kitale Land Case No. 107 of 1996**, but avers that the defendant herein was not a party to that suit and he denies that this suit is *Res Judicata*.

5. Hearing of the instant suit took place on 25/7/2017. The plaintiff testified and called no witness. The defendant on the other hand called two witnesses.

6. The plaintiff maintained that he bought **3.5 acres** from Jackson Makokha; that he has lived on the land for almost **30 years** and that Jackson was a shareholder on the Farm.

7. The plaintiff produced a copy of the decree in **Kitale Land Case No. 107 of 1996** as "**P. Exhibit 3.**" He said that a search at the Land Registry showed that his land is **2 acres**. He therefore asked the court to be given the **1 ½ acres** balance. Upon cross examination the plaintiff conceded that he had transacted with Jackson Makokha over the suitland and not with the defendant. He also admitted that the decision in

**Kitale Land Case No. 107 of 1996** never compelled the defendant's directors to give him 1.5 acres. He maintained that he never collected the title as it showed lesser acreage than he bought, and that the defendant is the one who gives members their title.

### **The Defendants' Case**

**8. DW1**, one Bernard Mula, who described himself as Chairman of the defendant society testified that the Co-operative Society had contracted an Agricultural Finance Corporation Loan of Kshs.1,300,000/= which was cleared using proceeds received from members as payment for their shares. The witness testified that members signed a document ascertaining their shares, then the surveyor came in and confirmed each member's shares, whereupon members were issued with land depending on their shares. According to the area list, the plaintiff's plot is No. 411 measuring 0.809 Ha. **DW1** stated that according to the records, Jackson Makokha was originally entitled to 6 acres which he sold in portions to a number of people including the plaintiff. When he realized he had sold all land, he brought all the buyers to the defendant's office just as the final list was being prepared on 30/6/1991 and told the defendant that they had all agreed to reduce their acreage so that they can accommodate the vendor; The defendant was not however involved in that decision; The plaintiff raised his claim for 1.5 acres more only after the list had been prepared and submitted elsewhere. However in that accusation the defendant was not mentioned anywhere. Only the plaintiff and Jackson Makokha were parties in **Land Case No. 107 of 1996**. The transfer produced by the plaintiff as "**P. Exhibit 2**" was never accepted by the defendant since Jackson's family complained that he was selling land without their involvement. The last portion that Jackson is said to have transferred was to his wife; it measured 1 acre.

9. Upon cross examination **DW1** stated that the plaintiff had no *locus* to sue the defendant as he was not a shareholder in the defendant. **DW1**'s evidence was largely corroborated by **DW2**'s and **DW3**'s evidence.

10. The plaintiff filed final submissions on 26/9/2017 and the defendant on 27/10/2017. I have considered those written submissions. The issues arising in this case are as follows:-

- a. *Was the plaintiff a member of the defendant?*
- b. *Is the plaintiff entitled to 1.5 acres from the defendant?*
- c. *Is this suit Res Judicata?*
- d. *Who should bear costs?*

The issues are discussed as hereunder:-

#### **(1) Was the Plaintiff a Member of the Defendant society?**

**11.** I have considered the contents of "**P. Exhibit 1**" and "**P. Exhibit 2.**" "**P. Exhibit 1**" is a sale agreement dated 1/7/1984 for 3 ½ acres between the plaintiff and Jackson Makokha. It showed that the land was fully paid for at its execution. "**P. Exhibit 2**" on the other hand, is a document without title, but which bears the letterhead of the defendant. It refers to the parties, the plaintiff and Jackson, as transferee and transferor respectively. However, in the form, instead of a Share Certificate Number, there is a Plot Number, that is Plot No. 66A measuring 3 ½ acres. The agreed price is said to be Kshs.27,100/=, just like in "**P. Exhibit 1**". The form is said to be signed by the transferee in the presence of the Secretary to the defendant. There is no signature of the Chairman on the form.

**12.** No Share Certificate was produced by the plaintiff bearing his name. It would therefore appear that no Share Certificate was transferred to the plaintiff by Mr. Jackson Makokha. The upshot of the above analysis is that the plaintiff is not and was never a member of the defendant society; he only came to purchase land from a member who owned shares in the society and who had been allotted land by virtue of his shareholding in the defendant society.

## **(2) Is the Plaintiff entitled to 1.5 acres from the Defendant?**

13. The defendant has pleaded that there was no privity of contract between it and the plaintiff. The defendant maintains that the sale agreement was strictly between the plaintiff and one Jackson Makokha. In my view, this is the correct position. **“P. Exhibit 1”** was executed by the parties in the absence of the defendant’s officials on 1/7/1984. **“P. Exhibit 2”** was executed by the plaintiff only in the presence of only one official of the defendant on 20/10/1984. **DW1** maintained that the transfer produced as **“P. Exhibit 2”** was never fully sanctioned by the Society. I am persuaded by this argument since firstly, it is executed by only one official and secondly, it never gave rise to the issuance of a share certificate in the name of the plaintiff. It would seem that, which observation is not farfetched or removed from normal practice in Societies, that direct entitlement to land from the defendant normally arose from a member’s shareholding in the defendant society and the plaintiff had none. Furthermore the transfer produced as **“P. Exhibit 2”** merely reiterated what **“P. Exhibit 1”** evinced, that there was a transaction of 3 ½ acres between the plaintiff and Jackson Makokha. It appears that by the time the plaintiff came along and entered into a land transaction with the said Jackson Makokha the defendant had already allocated all its land to its members. There was simply no possibility that the defendant could allocate land belonging to Jackson to the plaintiff if Jackson had already sold all his land to other people and especially if the defendant was not involved in the sale agreements in the first place.

14. For that reason I find that the plaintiff was not and is not, entitled to 1.5 acres from the defendant, but from the estate of Jackson Makokha.

## **(3) Is this suit Res Judicata?**

15. The copy of decree in *Kitale Land Case No. 107 of 1996* was produced in evidence as **“PEXh.3.”** It shows that the plaintiff herein was the plaintiff therein while the defendant was Jackson Makokha. The defendant herein did not feature in that suit otherwise it would have been obvious from the said decree. The decree in that suit states as follows:-

**“(1) The agreements made on 30/6/1991 are declared null and void whereas the first one is a genuine one as it reflects the payments acreages and land on the ground.**

**(2) The plaintiff herein is therefore awarded 3 ½ acres of land from the defendant and the same being part of Plot No. 66 Bikeke Farmers Co-operative Society Farm, LR. No. 6626/? ”number unclear”.**

16. It is difficult to see how this decree can make this suit *Res Judicata*. The elements needed to prove *Res Judicata* are contained in **Section 7 of the Civil Procedure Act**. They are, first, that the suit being challenged be between the same parties or parties under whom they or any of them claim, litigating under the same title. It cannot be said that the defendant in that suit was joined as an agent, or on behalf of the defendant herein or that they shared a common interest in the suitland. Though the subject matter of the suit is 3 ½ acres in Bikeke Farm, the first test of applicability of *Res Judicata* principle hereby fails. There is no need to examine any other limbs applicable in such a test. I therefore find that this suit is not *Res Judicata*.

## **(4) What orders should issue?**

17. This court has established that the plaintiff was not a shareholder in the defendant society and that he was not entitled to 1 ½ acres from the defendant. It is unfortunate that the plaintiff sat on his laurels and failed to pursue his claim for land or refund from the person who sold him land. He cannot be allowed to pursue the defendant herein. His claim lies elsewhere. The plaintiff has therefore not proved his case on a balance of probabilities against the defendant. The upshot of the above is that the plaintiff’s case cannot stand and I dismiss it entirely. However, each party shall bear its own costs.

**Dated, signed and delivered at Kitale on this 20<sup>th</sup> day of December, 2017.**

**MWANGI NJOROGI**

**JUDGE**

**20/12/2017**

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Mr. Mula for defendant

Mr. Khaosa holding brief for Ngeywa for plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**20/12/2017**