IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 100 OF 2015

BETWEEN

BOTWA FARM COMPANY LTD..............................APPELLANT

AND

THE SETTLEMENT FUNDS TRUSTEE.......1ST RESPONDENT

THE ATTORNEY GENERAL........................2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment & Land Court of Kenya at Kitale, **(Obaga, J.)** dated 30th day of June, 2015 ***in*** **Environment & Land Case No. 66 Of 1997)**

****

JUDGMENT OF THE COURT

BACKGROUND

[1] This is an appeal from the judgment of the Environment and Land Court (Obaga, J) dismissing a suit filed by Botwa Farm Company Ltd (the appellant herein). The appellant which is a farmers company, claimed to have been allocated a parcel of land known as L.R No. 6109 (the suit land) by The Settlement Fund Trustees (SFT) (the 1st respondent), in 1979. SFT is a trustee established under the Agriculture Act. The purchase price for the suit land was Kshs 2,000,000 of which the appellant paid a deposit of Kshs. 200,000 to SFT after which 169 shareholders/members of the appellant took vacant possession of the suit land. In 1980, the Government, the appellant and SFT agreed to subdivide the suit land to provide for each of the 169 members of the appellant and other portions for public amenities. The demarcation and sub division was carried out with the participation and consent of the appellant and the respondents; after which the shareholder members took possession of their allocated parcels of land and developed the same. The appellant complained that in 1991, one **J.K. Koskei**, a District Settlement Officer in Trans- Nzoia District purporting to act on behalf of 4 shareholders of the appellant company, ordered that the suit land be sub divided into three portions along tribal lines comprising 487 acres, 310 acres and 229 acres.

[2] Aggrieved by the proposal to subdivide the suit land along tribal lines, the appellant filed **High Court Civil Case No. 49 of 1991 at Eldoret.** The learned Judge (Aganyanya J.) granted a permanent injunction restraining the District Officer (or any person acting through him) from subdividing the suit land along tribal lines. The learned Judge declared any subdivision along tribal lines to be unlawful, illegal, unconstitutional and contrary to public policy.

[3] The order of Aganyanya J should have resolved the matter, however on or about 7th June, 1995, SFT, purporting to be acting on behalf of the Government of Kenya and the 2nd respondent, purported to repossess the suit land from the appellant and J. K. Koskei again purported to subdivide the suit land and to allocate it to non- members of the appellant company to whom title deeds were issued. The appellant contended that the respondents had no legal and/or equitable right to resurvey, subdivide and/or re-allocate the suit land or to issue title deeds other than in accordance with the allocation done in or about 1980. In an effort to demonstrate that it was willing to pay the balance of the purchase price for the suit land and to fulfill all the required conditions, the appellant on 30th January, 1995, through their advocates forwarded a banker's cheque of Kshs.150,000/= to the Director of Land Adjudication & Settlement but the cheque was returned to the appellant.

[4] The appellant therefore sought declarations: that the repossession of the suit land by the 1st respondent was null and void; that the suit land is the appellant's property; that the subdivision of the suit land to the appellant's 169 members was valid; and that the sub division and subsequent allocation of the suit land by the 1st respondent and/or the former District Settlement Officer, Trans Nzoia District was invalid. The appellant also prayed for an order restraining the respondents from interfering with the appellant's peaceful stay and enjoyment of the

suit land; and an order cancelling the title deeds issued to non-members of the appellant company.

[5] The respondents filed a joint defence to the appellant's claim in which they denied the appellant's claim. In particular the respondents denied having received the payment of a sum of Kshs.200,000/= or any other amount from the 1st respondent; or that the appellant took vacant possession of the suit land or that the 1st respondent agreed with the appellant on the sub-division thereof on 10th June, 1980 or at all.

[6] The respondents maintained that the 1st respondent could repossess the suit land from the appellant as the appellant was not in possession of the suit land; and denied that sub-division and issuance of title deeds in respect of the suit land was done and effected to the wrong and or undeserving parties. In addition, and without prejudice to the denials, the respondents raised a preliminary objection that the appellant has no *locus standi* to file the suit; and that the appellant has not complied with the mandatory provisions of **section 12 and 13A** of the **Government Proceedings Act (Cap 40)** Laws of Kenya.

[7] In its judgment, the High Court, (Obaga J) dismissed the appellant's suit, finding that there was no contention that the appellant was allotted the suit land by the 1st respondent in the year 1979, and that this was subject to the appellant paying the purchase price of Kshs. 2,000,000; that the appellant paid 10% of the purchase price only and sixteen years later, was yet to pay the balance of Kshs. 1,800,000; and this is what gave rise to the demand by the 1st respondent for payment of Kshs. 3,999,276.65/- (inclusive of accrued interest). The court further found that the appellant failed to pay the amount demanded, which led to the Director of Land Adjudication and Settlement writing a letter cancelling the allocation of the suit land in favour of the appellant.

[8] Regarding the alleged attempts to pay the balance of the purchase price with a cheque of Kshs. 150,000/- that was declined, the learned Judge stated as follows:

> **"It is common knowledge that the settlement officer allocates land upon certain conditions. These conditions include payment of 10% deposit and payment of the balance afterwards. In this case, the plaintiff paid only 10% deposit. The balance was not paid. When the settlement officer demanded for the balance plus accrued interest, the plaintiff did not pay… the plaintiff cannot have land for which they did not pay for. The allocation of the land to the plaintiff was cancelled for breach of the terms and conditions in the letter of allotment. The land was allocated to those who met conditions set by the Settlement Fund Trustees. These are the ones who have obtained titles. Their titles cannot be cancelled…"**

[9] Aggrieved by this judgment the appellant filed this appeal urging the Court to set aside the judgment of the High Court on the grounds that the trial court erred: in failing to find that the repossession of the suit land by the respondents was invalid; in failing to find that the suit land is the appellant's property; in failing to find that any subdivision of the suit land by the respondents and issuance of title to non-members of the appellant was unlawful; and in failing to find that the acts of the respondents' agents declining receipt of the balance of the purchase price was illegal and unlawful.

SUBMISSIONS

[10] When the appeal came up for hearing, **Mr Ogola** held brief for **Mr Katama Ngeywa**, learned counsel for the appellant. There was no appearance by counsel for the respondents. The appellant and the respondents had both filed written submissions. The appellant in its submissions submitted that the appellant's evidence remained undisputed and that the learned Judge erred in considering the evidence presented by the respondents in their pleadings, despite the same not having been produced in court as evidence, and consequently, the learned Judge erred in dismissing the appellant's claim. The case of **Janet Kaphiphe Ouma & Another -vs- Marie Stopes International Kenya HCCC No. 68 of 2007** was relied on.

[11] The respondent in response submitted that the documents attached to their list of documents presented before the trial court were public documents and that the trial court was guided by the provisions of **Section 60** of the **Evidence Act, and** thus took judicial notice that the documents relied on were public documents, and did not confer any legal ownership of the suit land to the appellants. It was further submitted that since the allocation of the suit land to the appellant was cancelled and no certificate of outright purchase issued to it, the appellant's interest over the suit land was extinguished when the allocation was cancelled, and the appellant's appeal therefore lacked merit. Counsel urged us to dismiss this appeal.

DETERMINATION

[12] We have considered the appeal, the rival submissions made by the parties, the authorities cited and the law. This is a first appeal. In **Kamau v. Mungai (2006) 1 KLR 15** this Court considering a first appeal stated:

> **"Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that."**

[13] The mandate of SFT is provided under **Section 167(2)** of the Agriculture Act Cap 318 (now repealed) which states;

> **"The Settlement Fund Trustees shall, by that name, be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and, for and in connection with the purposes of this Part, may purchase, hold, manage and dispose of movable and immovable property, and may enter into such contracts as it may deem necessary or expedient."**

[14] It was evident from the facts presented by the appellant that it only paid the 10% deposit for the suit land and that it had not paid the balance hence the letter dated 17th February, 1993 from the District Land Adjudication and Settlement Officer addressed to the appellant demanding the balance of the purchase price and accrued interest. In addition, by a letter dated 23rd February, 1995, the Director of Land Adjudication and Settlement wrote to the appellant cancelling the allocation.

In **<u>John Kamunya & another v John Nginyi Muchiri & 3 others</u> [2015] eKLR** this Court dealt with an appeal in which a land transaction between a purchaser and a seller took place before the seller had completed paying a mortgage that he took out with the Settlement Fund Trustee. The Court went on to find that no contractual relationship with regard to the suit land could be legally created as between the purchaser and seller before the seller had discharged his indebtedness to the Settlement Fund Trustees, and the title to the suit land transferred into his name as an owner, and therefore he could not proceed to sell the land to the purchaser.

[15] By parity of reasoning, the appellant can only be granted the orders sought if they indeed prove that they met the terms of the sale of the suit land. Upon paying the initial deposit which was 10% of the purchase price, the appellant gained beneficial interest over the suit land but the appellant's members were only entitled to have titles granted to them upon full payment of the purchase price.

[16] The appellant alleged that their efforts to pay the balance of the purchase price were frustrated by **J.K.Koskei**, a District Settlement Officer with Trans-Nzoia District, however, they did not produce cogent evidence to prove this claim. But even assuming for the sake of argument that they made efforts to pay the sum of kshs 150,000 on 30th January 1995 as alleged, this was a payment which was less than ten percent of the balance that had been owing for 15 years. It was therefore "too little coming too late". Moreover, the appellant went to the High Court in 1991 and obtained orders restraining the respondents from subdiving the suit land along tribal lines. If the appellants were serious about paying the balance of the purchase price they could easily have done that by making payment through the court. Sixteen years down the line, the appellants having failed to make full payment it cannot be heard to complain about the repossession.

[17] The appellant further argues that the learned Judge erred in relying on the documents filed by the respondents at the trial court despite the respondents not participating in the hearing or having the documents produced in court as evidence. In **<u>Kenneth Nyaga Mwige v Austin Kiguta & 2 others</u> [2015] eKLR** this Court had occasion to sit on an appeal where the trial court in its judgment relied on documents "Marked For Identification - MFI" and not produced in evidence. The Court stated as follows:

> **The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? <u>Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case.</u> When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.**
>
> **………**
>
> **Once a document has been marked for identification, it must be proved. <u>A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account</u>.** [Emphasis added].

[18] Based on the above, the trial court should have restricted itself to the documents formally produced during trial. The respondents did not attend the trial and the makers of the documents attached to their list of documents were not called to formally produce the documents and for the appellant to cross examine them on the contents of the letters. For this, the trial court erred in basing its findings on those documents. This notwithstanding, under section 107 of the Evidence Act, the burden of proof lies on whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, to prove the existence of those facts. As it was the appellant who filed the suit against the respondents seeking judgment on their right to the suit land, the burden was on the appellant to prove the facts upon which his right arose. This the appellant failed to do. The appellant cannot therefore rely on the failure by the respondents to call evidence, when its own evidence adduced before the court was not sufficient to prove its case.

[20] Moreover the respondents do not now own the suit land. Admittedly, upon repossession in 1995 the respondent allocated it and issued title deeds to the new owners. The appellant did not join the new owners as parties to the suit. Their titles could not have been cancelled without giving them an opportunity to be heard.

[21] For the foregoing reasons, we find that the appeal lacks merit. It is accordingly dismissed with costs to the respondents.

Those shall be the orders of the Court.

Dated and Delivered at Eldoret this 17th day of October, 2019.

E. M. GITHINJI

………………………..

JUDGE OF APPEAL

HANNAH OKWENGU

…………………..……..

JUDGE OF APPEAL

J. MOHAMMED

……………..…………..

JUDGE OF APPEAL

I certify that this is *a true copy of the original*.

DEPUTY REGISTRAR