



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 69 OF 2014

BETWEEN

NYACHIRO SIRIBA.....APPELLANT

AN.D

ONCHWARI MOGAKA.....1ST RESPONDENT

GORI KIBONDORI.....2ND RESPONDENT

ABANCHANI FARMERS CO. LIMITED.....3RD RESPONDENT

(Appeal from the Judgment and decree of the High Court Land at Kisii Sitati, J.) dated 9th May 2013

in

Kisii H.C.C.C. NO. 119 of 1994)

JUDGMENT OF THE COURT

In this long and protracted dispute, with a genesis in an earlier suit, *the appellant, Nyachiro Siriba*, claims that Onchwari Mogaka, the 1st respondent (*Onchwari*) is holding 6 acres comprised in Title No. Nyamira/Nyankono/55 in trust for him, which trust should be terminated and the 6 acres transferred to him forthwith.

By an amended plaint dated 10th November 2004, the appellant claimed that he was a fully paid up member of the Abanchani Farmers Co. Limited, a land buying company (*the Company*). That sometime in 1996, he paid Kshs. 10,000/- towards his contribution of the share capital in the Company thus rendering him one of the 32 shareholders. It was his understanding that the share in the Company would entitle him to 23 acres portion of the said Title No Nyamira/Nyankono/55.

It was his case that sometimes in 1969, Gori Kibondori, (Gori), his brother, the 2nd respondent and Onchwari entered upon his portion of the Company land, and that subsequently in collusion with the Company fraudulently registered 6 acres which belonged to him in Onchwari's name as Title No.

Nyamira/Nyankono/53. The particulars of fraud were that the respondents failed to inform the Nyamira District Land Registrar that Nyachiro and Onchwari were to distribute the share in the Company entitling him to 23 acres equally between them in accordance with the resolutions of the meeting of the Company, and that in tandem with their distribution, Gori and Onchwari were to share Onchwari's 11½ acres between themselves equally as decreed by the court in *HCCC No 80 of 1973*.

In their defence, the respondents denied that Nyachiro purchased the share in the Company, and put him to strict proof. It was their contention that they had purchased the share from the Company, and that since Gori had invited Onchwari as their brother in law to join him in the purchase of the share, Gori's entitlement of 11½ acres of land was to be shared with Nyachiro. It was their position that, while it was understood that each shareholder in the Company was to receive 23 acres of land, their share was to be equally shared amongst the three of them.

Upon considering the evidence and submissions of the parties, the High Court arrived at the conclusion that a trust did not exist between Nyachiro and Onchwari and dismissed the suit with costs to the respondents.

Aggrieved by the decision of the High Court Nyachiro has filed this appeal specifying several grounds, in particular that the learned judge fell into error when she failed to find that Nyachiro was one of the 32 original shareholders of the Company; that the court failed to appreciate that Nyachiro and Onchwari were recognized as joint owners of one share which entitled them to one of the 32 plots; that the learned judge misconstrued the terms of the consent recorded by Cotran, J, in *HCCC No. 80 of 1973* regarding Nyachiro's entitlement to the land; that the learned judge failed to take into account the available documents showing that Nyachiro was a shareholder as evidenced by the interlocutory application dated 5th April 2004; that in failing to consider Nyachiro's evidence and submissions, the learned judge reached the wrong conclusion that the Nyachiro was not holding 6 acres on trust for him.

When the appeal came up for hearing, by consent, the parties, agreed to withdraw the appeal against the Company as it had since been wound up.

Learned counsel for the appellant, **Mr. Migiro** stated that on account of the submissions and the amended plaint, judgment should have been entered in favour of Nyachiro to the effect that of the 23 acres, the respondents were to share 11 acres between them, while Nyachiro was to retain with 11 acres, and that this was evident from the minutes of the meeting of the Company. Counsel submitted that Gori's evidence was that as he was unable to pay the full amount required for a share in the Company, he had brought in his brother in law, Onchwari, to assist with his payments. That on account of this, it is Onchwari's portion that ought to have been shared with Gori and not Nyachiro's. Counsel further submitted that the learned judge misconstrued the consent in the judgment by Cotran, J.

Counsel's complaint was that the learned judge also misconstrued crucial evidence, and therefore this Court should reevaluate the evidence and arrive at its own independent conclusion. It was also pointed out that the respondents had not responded to the allegations of fraud.

Mr. Soire, learned counsel for the respondents opposed the appeal. He submitted the from the plaint, Nyachiro begun by averring that he was entitled to one share of the Company that was equivalent to 23 acres to the exclusion of the Onchwari and Gori. Later, Nyachiro changed his story and claimed that he had been deprived of 6 acres that had been incorporated into Onchwari's portion. Counsel further submitted that the Land Control Board application that was marked as "MFID4" and the minutes of the meeting of the Company were not at any time produced during the trial, and therefore these documents had not been admitted in evidence and could not therefore be relied upon.

Counsel also refuted the contention that the learned judge had misapprehend the judgment in *HCCC No.80 of 1973* where the suit parties were Onchwari, Gori and the Company, and which concerned the same Company share of which Nyachiro was aware. The learned judge was clear that Onchwari and Gori were to get 11 acres each, since he was invited by both Gori and Nyachairo to contribute towards payment of the share. Counsel stated that during that dispute Nyachiro supported Gori his brother in

opposing Onchwari's claim.

In his reply Mr. Migiro stated that the learned judge should have entered judgment on account the admissions in the amended plaint, as well as, the minutes of the Company's meeting and the consent, and cited ***Choitram vs Nazari [1982-88] 1 KAR 437*** for the contention that judgment may be entered by the court on admitted facts.

We have considered the pleadings, submissions of the parties, as well as the law, and in our view what requires to be addressed is whether following the court order in ***HCCC No. 80 of 1973***, a trust existed between Nyachiro and Onchwari.

This being a first appeal, we must consider the evidence adduced before the trial court, evaluate it and draw our own conclusions. We are alive to our duty on a first appeal as stated by Sir Clement de Lestang VP in ***Selle v. Associated Motor Boat Company [1968] E.A. 123 at p. 126***;

"... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, 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 witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the 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, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

This was cited with approval by this Court's in ***Jivanji v. Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431***.

In determining whether the Onchwari held 6 acres on trust for Nyachiro, we shall be required to re-evaluate evidence that was before the trial court so as to arrive at our own independent finding.

It was Nyachiro's evidence that he acquired a share in the Company and was allocated Plot No. 5 comprising 23 acres. He stated that he took possession of the parcel in 1969. It was when he was unable to pay further contributions for the share that he says he requested Gori to pay some money towards the purchase of the land. Instead, Gori invited their brother in law, Onchwari to join them. Nyachiro produced a receipt showing payment of Kshs. 4000/- on which both his name and that of Onchwari appeared. He contended that he disputed the inclusion of Onchwari's name on the receipt with reference to the payment he had made. Following the consent in ***HCCC 80 of 1973***, it was agreed that Onchwari and Gori be registered as joint proprietors of the land. It was Nyachiro's contention that, despite the consent, the Company resolved that he would be allocated 11 acres while, Onchwari and Gori would be allocated the other 11 acres jointly. His complaint was that instead of Onchwari sharing his 11 acres with Gori, the 11 acres that was to go to Nyachiro was shared equally between himself and Gori.

Onchwari testified that he partnered with the Gori to purchase the land jointly. He stated that he was among the original shareholders of the Company, but that he used the Gori's name to contribute towards the share capital of the Company as Gori did not have the money to pay for the land. He stated that a dispute arose between himself and Gori as the latter planned to keep the entire 23 acres. As a result, he filed a case ***HCCC 80 of 1973***, where a consent was entered that Gori and Onchwari be registered as joint proprietors of the land which by that time had yet to be subdivided. When it was later subdivided, by virtue of the court order, each of the parties to the suit was allocated 11 acres. It was his contention that by this time the appellant was a child, and that at all times he had purchased the land with Gori, but that at some stage Gori's name was expunged from the list of shareholders and replaced with the appellant's name. At no point was it intended that he would share his 11 acres with Gori.

According to Gori, he was a member and shareholder of the Company, and when he realized he would be unable to keep up with his contributions, he invited Onchwari to partner with him. That by this time the

appellant was young and could not have had any share in the Company, and neither was he occupying the land. That following the settlement of the dispute, it was agreed that the land be shared between himself and Onchwari equally. He stated that he invited the appellant, his younger brother to share his (Gori's) portion of the land as their ancestral land was too small.

The testimony of Pastor William Buruch, a director of the Company provided further insight into the ownership of the share in the Company. He stated that Onchwari and Gori jointly owned the share, and that when Gori sought to deny Onchwari his portion, the latter had filed a suit in court. The consent that was entered into required the Company to register the share jointly between Onchwari and Gori, where each would get 11 ½ acres of land. He further stated that Nyachiro was not a member of the Company but was allocated 5 ½ acres out of the 11 acres by his brother Gori. According to him the initial contribution per share was Kshs. 10,000/-. He was certain that the Onchwari and Gori were to divide the one Company share between them.

On that evidence, it is not in dispute that the initial contribution towards each share was Kshs. 10,000/-. It is also not in dispute that upon subdivision of the Company land each share would translate into 23 acres of land or thereabouts.

It was Nyachiro's evidence that he was the original invitee to take up a share in the Company. When he was unable to complete the payment, he testified that he invited his brother, Gori to join him as a contributor. On his part, Gori testified that he was the original invitee to take up a share in the Company. When he failed to keep up with the contributions he invited the Onchwari to join him. This evidence was corroborated by the testimony of Pastor Buruch.

A re-evaluation of the evidence on record, clearly points to the inability of both Nyachiro and Gori to exclusively pay for the Company's share. As a result, Onchwari was invited to join them by contributing to secure the share.

As concerns the contributions, Nyachiro testified that he contributed a sum of Kshs. 10,000/- which entitled him to exclusive ownership of the share. We can find no other evidence to support this contention. What was available was a receipt dated 15th April 1977 for Kshs. 4,000/- bearing the name of both Nyachiro and Onchwari. As such, without other evidence to show that Nyachiro paid for the share to the exclusion of Gori and Onchwari, the only conclusion that could be reached was that both Nyachiro and Onchwari contributed to the share, in the Company.

Once the share was secured, a scheme was hatched to deny Onchwari a portion of the land. This dispute culminated in **HCCC 80 of 1973**, between Onchwari, Gori and the Company. By this time Nyachiro was not a party to the dispute, and neither had he registered any interest in the controversial share. On 20th March 1973, a consent between Onchwari, Gori and the Company was recorded. It was ordered that;

“This case is settled upon terms that the plaintiff is now registered as a joint proprietor with the 1st defendant or his successor in title of land in dispute”.

The order is clear and unequivocal, and we find that the learned judge did not misapprehend or misconstrue its interpretation. Though the pleadings were not made available to the court, from the proceedings and the consent, there is no doubt that the dispute between Gori and Onchwari concerned the ownership of one share in the Company equivalent to 23 acres. From the order, Gori and Onchwari were to own the share jointly, meaning that when the land was eventually subdivided each was to acquire 11.5 acres or thereabouts of land. This order was never set aside or appealed by the parties. Therefore, by order of the court, Onchwari acquired 11.5 acres of Company land, leaving a balance of 11.5 acres for Gori.

Nyachiro's claim is that because Gori invited Onchwari to join him in contributing towards the share, it is Onchwari who should have shared his 11.5 acres with Gori, so that Nyachiro would be left to retain 11.5 acres instead. We disagree. At the point when the dispute concerning Onchwari's 11.5 acres was settled vide **HCCC No. 80 of 1973**, no further claims could arise in respect of his portion, and, invariably, the only land available for distribution by the Company subsequent to the court order was the portion issued

to Nyachiro or Gori, or both. It mattered not at this stage who amongst the parties was the original shareholder of the one share.

It followed therefore that, when the land was subsequently subdivided, the Company was compelled to comply with the court order, and to allocate half the available acreage equivalent to 11.5 acres to Onchwari. As evidenced by the Title No. Nyamira/Nyankono/53, the Company in compliance with that order allocated the requisite acreage to Onchwari leaving the remaining 11.5 acres to be shared between Nyachiro and Gori.

In the face of these facts, like the learned judge, we find that as a consequence, at no time did a trust between Onchwari and Nyachiro come into existence. We would also add that the question of fraud did not also arise, having regard to the facts of the case.

Having arrived at this conclusion, we consider that the learned judge assiduously analysed the evidence that was placed before her, and arrived at the correct findings. We therefore find no reason to disturb this decision.

For the reasons set out above, the appeal is dismissed with costs to the respondents.

It is so ordered.

Dated and delivered at Kisumu this 4th day of March, 2016.

D. K. MARAGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy
of the original

DEPUTY REGISTRAR