



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: NAMBUYE, GATEMBU & SICHALE JJA)**

**CIVIL APPEAL NO.58 OF 2007 (NAK 5/07)**

**BETWEEN**

**NYANDARUA PROGRESSIVE AGENCIES LIMITED.....APPELLANT**

**AND**

**GRACE WAMBUI NJOROGE.....RESPONDENT**

**(An appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Visram, J)  
dated 14<sup>th</sup> January, 2004 by M. Apondi J**

**in**

***Nakuru HCC. 53 of 1999)***

.....  
**JUDGMENT OF THE COURT**

The respondent moved to the seat of justice at Nakuru High Court and filed Civil Case Number 53 of 1999 on the 11<sup>th</sup> day of February 1999. The claim was directed against the appellant **Nyandarua Progressive Agencies Limited**. The respondent's averments in the plaint briefly are that she had been a member of the appellant since the year 1977 being an owner of 120 shares. She fully paid the requisite fees of Kshs.5,000/= and was in the months of March 1986 allocated plot number 1575 measuring four (4) acres, where upon she took active possession and started carrying on farming activities including planting, growing, tending and harvesting coffee, bananas, sugar cane and Napier grass both for her own consumption and for sale. The source of grievances leading to the filing of the said suit arose from the appellant's purported move to dispossess her of the suit plot vide its letter to that effect dated 19<sup>th</sup> January, 1999. In consequence thereof the respondent sought a declaration that she was the legal owner of plot No.1575, that the appellant and its servants, agents and or employees were trespassers on the said plot, an order ejecting the appellant its servants, and agents from the said plot, an order allowing the respondent possession of the suit plot to the exclusion of the appellant, its servants and or employees, a perpetual injunction restraining the appellants its agents and or servants from being upon and or remaining upon the suit parcel of land, general damages, costs, interest and any other relief that the court may deem fit to grant.

The appellant defended the said claim vide a defence and counter claim filed on the 1<sup>st</sup> day of November, 1999. In its defence the appellant denied the respondent's allegations that she was a share holder of the appellant, denied existence of any shares for sale to the respondent in the year 1986, maintained that it was the legal owner of the suit plot and on that account the respondent was a trespasser as her occupation of the suit plot was unlawful and counter claimed for the said plot No.1575 which was in fact belonging to a share holder by the name of **Wamboo**.

The respondent filed a reply to defence and defence to the counter claim on 16<sup>th</sup> day of December, 1999 joining issue with the appellant on its defence and denying the appellant's assertions in their counter claim.

Parties were heard. The respondent called five witnesses namely **(PW1) Grace Wambui Njoro** the respondent, **(PW2) Yucabeth Matoke Ogega**, **(PW3) Boniface Phillip Mbai Kimama**, **(PW4) Peter Wanjohi Karanja** and **(PW5) Josephat Mureithi Muruhi**. While the appellant called two witnesses namely **(DW1) George Mwaura Nganga** and **(DW2) Francis Elias Wainaina Mbugua**. In a judgment delivered on the 14<sup>th</sup> day of January 2004 **Visram J** (as he then was) found for the respondent.

The appellant was aggrieved with the afore said decision and filed the appeal subject of this Judgment citing 13 grounds of appeal. In a summary the appellant contended that the respondent had not demonstrated ownership of the suit plot and that whatever documents had been relied upon by her were in fact forgeries and on that account urged this court to allow the appeal, interfere with the Superior Courts' decision by setting aside the orders which had been made by **Visram J** as he then was and substitute there to with an order dismissing the respondent's case in the Superior Court and allow the appellant's counter claim with costs.

In his oral address to the court, learned counsel for the appellant **Mr. John Githui** urged us to allow the appeal arguing that the respondent had not made out her case in the Superior Court because there was no proof of disposition of the suit plot in favour of the respondent; that even if it can be taken that the respondent was a share holder of the appellant, that share holding only entitled her to a share of the profits; that there was no proof that the Head title had been surrendered to pave way for subdivisions and issuance of individual titles; that it was wrong for the trial Judge to find for the respondent and yet he had questioned the demeanor of the respondent. Learned counsel for the appellant went on to add that the act of allocation of the suit plot had not been demonstrated to exist and even if the same had been done, it was invalid as it had purportedly been allocated by the board of Directors and not the company which is a separate entity distinct from the board of Directors. It is learned counsel's further contention that the respondent had been allotted plot number 1540 by the board of Directors; there is a possibility of the respondent having accessed the ballot cards irregularly as she had been a secretary at the appellants offices when the appellants' affairs were in disarray giving rise to a reasonable conclusion that this is a clear case of forgery. On this account it is the appellant contention that the learned Judge's Judgment is unsupportable and it should be upset.

In response learned counsel for the respondent **Mr. John Kagucia** urged us to dismiss the appeal and confirm the decision of the superior court on the grounds that the respondent has been in occupation of the suit plot for close to forty (40) years; the unchallenged evidence of PW2 confirmed that the respondent was a bonafide share holder of the appellant; the appellant's allegation that the suit plot claimed by the respondent belonged to another allottee held no water as the alleged allottee never came forward to claim the suit plot; that the defence evidence was contradictory and was rightly rejected by the learned trial Judge. The court is urged to ignore allegations of fraud and forgeries as these were not specifically pleaded in the defence. The appellant's defence was not tangible as it had just been based on mere general denial; that the alleged rightful share holder was an invention of the appellant. Lastly that the balance of probability tilts in favour of the respondent and should not be tilted towards the appellant by this court.

This being a first appeal our mandate is as set out in the cited case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA.212** wherein the Court of Appeal held inter alia that:-

***“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their evidence.***

We have revisited the record as it had been placed before the trial Judge and we evaluated the evidence tendered and found that after evaluating the evidence of both sides which had been placed before him, the learned Judge made the following observations:-

***“According to the plaintiffs’ testimony (PW1) she used to work for the defendant....in 1977 she became a member of the company by paying a contribution and issued with a share certificate (See P. Ex.1) these entitled her to be allocated land by the defendant. The defendant allocated her the plot and she took possession of the same in 1986. She developed the plot and planted coffee, bananas, sugar cane and other crops on it. She was not interrupted until January 1999 when she received a letter from the defendant stating that the plot did not belong to her. She was aggrieved and went to the lands office at Nakuru who gave her a letter dated January 26<sup>th</sup> 1999 to the defendant stating that, that land was hers (See P. Exh.2).....***

***The plaintiff also called (PW2) Yucabeth Matoke Ogega an employee of the District Land Adjudication who said that according to the records in her possession from the defendant company the plot in issue belongs to the plaintiff.....***

***(PW3) Bonface Philip Mbai a founder member of the defendant confirmed he is the one who signed the plaintiffs share certificate but the plaintiff had not been allotted any land by the time.....***

***Peter Wanjogi Karanja (PW4) who was the secretary of the company between 1979-1987 stated that final subdivision of the land was done between 1984 to 1986 by the Land Adjudication Department. The plot in issue was allocated to the plaintiff in March 1986.....***

***Mr. Josephat Mureithi (PW5) who was also allocated another plot by the defendant also confirmed that the plaintiff was the person living on the plot in issue....***

***I listened to all the witnesses called by the plaintiff and the plaintiff herself carefully. They appeared to me to be common folk who said what they knew and I had no reason to doubt any of them. Their story was consistent in all respects. The defendant’s witnesses on the other hand did not impress me at all. They gave irrelevant testimony beyond the pleadings....***

***As was seen earlier, the defendants stated in its defence and counter claim that it had allocated the plot to one Wambo. This Wambo was not called in this case to support that allegation. In fact evidence emerged to that effect that the said Wambo sued the defendant in Nakuru HCCC 498 of 1999 claiming a totally different plot from the one in issue (see D. Ex.1) It is also evident that the plaintiff has lived on the plot since 1986 without interruption....I am satisfied the plaintiff has established her claim on a balance of probability to entitle her to the Judgments sought”***

We have on our own revisited the afore set out findings by the learned trial Judge in the light of the content of the entire record before us and we find no fault in them. Our reasons for saying so are as follows:-

- (1)The respondent had tendered documentary exhibits in support of her case whose authenticity was confirmed by the testimony of witnesses called by the respondent to support her stand.
- (2)The appellant did not plead fraud, forgery and invalidity of allocation of the suit plot to the respondent on account of the said allocation having been made by a Board of Directors as opposed to the Company.
- (3)The appellants’ major contest against the respondent’s entitlement to the suit plot was that the said plot

had been allocated to one **Wambo** who had allegedly taken the appellant to court claiming the said plot. It however transpired as found by the learned trial Judge and as we hereby also find that the correct factual position as demonstrated by the content of the record is that in fact **Wambo** sued the appellant seeking entitlement to a plot other than the one claimed by the respondent. Once **Wambo**'s entitlement to the suit plot is removed there is nothing which can be fronted by the appellant to defeat the respondent claim to the suit plot. As submitted by the respondents counsel, nothing prevented the appellant from joining **Wambo** to the Superior Court proceedings for him to assert his own.

In the result, we are satisfied as was the learned trial Judge(as he then was) that the appellant's defence and counter claim stood ousted and that the respondent had proved her case on a balance of probability as it was based on sound evidence. We find no reason to disturb that finding. The appeal is therefore dismissed in its entirety. The respondent will have costs both on appeal and the court below.

**Dated at Nakuru this 12<sup>th</sup> day of April, 2013.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....  
**JUDGE OF APPEAL**

**F. SICHALE**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**