



**Ituiku Farmers Company Limited v Misoi & 2 others (Sued on Behalf of Chemaluktany Farmers in their Capacities as Chairman, Secretary and Treasurer Respectively) (Environment & Land Case 58 of 2017) [2024] KEELC 13796 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13796 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 58 OF 2017  
CG MBOGO, J  
DECEMBER 16, 2024**

**BETWEEN**

**ITUIKU FARMERS COMPANY LIMITED ..... PLAINTIFF**

**AND**

**ELIJA MISOI ..... 1<sup>ST</sup> DEFENDANT**

**SIMON KIMETTO ..... 2<sup>ND</sup> DEFENDANT**

**NICHOLAS KORIR ..... 3<sup>RD</sup> DEFENDANT**

**SUED ON BEHALF OF CHEMALUKTANY FARMERS IN THEIR CAPACITIES AS CHAIRMAN, SECRETARY AND TREASURER RESPECTIVELY**

**JUDGMENT**

1. By a plaint dated 13<sup>th</sup> November, 2013 the plaintiff prays for judgment against the defendants for: -
  - a. An eviction order to issue to compel the defendant, its members, servants, employees or any other person claiming title under the defendant to vacate the plaintiffs’ parcel of land Narok/ Cis-Mara/ Ololulunga/ 137.
  - b. Damages for trespass.
  - c. Costs of this suit and interest thereon at court rates.
  
2. The gist of the plaint is that the plaintiff was the registered owner of the suit property known as Narok/ Cis-Mara/ Ololulunga/ 137 measuring 82 hectares, and that sometime in the year 1995, the chairman of the plaintiff purported to enter into a sale agreement with the defendants for the sale of the entire suit property, at a time when there was no resolution of the plaintiff appointing the advocate who



- undertook the conveyance for purposes of the sale agreement, and a resolution to sell the land to the defendants.
3. The plaintiff averred that the sale agreement was not supported by a letter of consent and neither was there such an application by the plaintiff or its directors. Further, the plaintiff averred that the defendants have consistently claimed ownership which has interfered with its quiet possession, ownership and use of the land.
  4. The plaintiff argued that it stands to suffer loss owing to the deprivation of the use of land, and further that in Kericho HCCC No. 14 of 2005, the suit was dismissed.
  5. The defendants filed their amended statement of defence and counter claim dated 20<sup>th</sup> May, 2022. While denying the contents of the plaint, the defendants averred that sometime in the year 1995, they entered into a binding sale agreement with the plaintiff's agents for the sale of the suit property measuring 200 acres at Kshs. 4,000,000/-. They also averred that the sale agreement between them and the necessary parties was negotiated, agreed upon, and that the payments were made in full through their transacting advocate's client account.
  6. The defendants further averred that failure to seek and obtain the requisite consents to effect a transfer was occasioned by a deliberate omission or reluctance by the plaintiff to seek and obtain the same. They averred that failure to prosecute Kericho HCCC No. 14 of 2014 was a result of an offer by Stephen Kiarie, the plaintiff's agent to pursue out of court negotiations with a view to settling the matter (out of court). They averred that having paid the full purchase price, they could not have been bound to concede to the plaintiff's demands or claim that their use of the suit property was without right.
  7. In their counter claim, the defendants contended that the necessary parties were the authorized agents of the plaintiff who had the authority to sell and receive proceeds from the sale of the suit property. They averred that in the year 1995, they entered into a sale agreement for the sale of the land at Kshs. 4,000,000/-, which was paid to the 2<sup>nd</sup> necessary party, with the authority of the 1<sup>st</sup> necessary party who was the authorized agent of the plaintiff. The defendants averred that upon sealing the sale agreement, they took vacant possession, and proceeded to subdivide the same amongst its members who have been in occupation to date.
  8. The defendants averred that it was an express term of the agreement that upon paying the full purchase price, the agents of the plaintiff would apply and obtain the Land Control Board Consent to transfer the land in their names, and that they would hold it in trust, subdivide and transfer into the names of its members. They also averred that the original title deed was at the time of the transaction left in the custody of the DC Narok North District, and that they don't know how a new title deed was issued in the name of the plaintiff.
  9. The defendants pleaded particulars of fraud to the extent that the plaintiff unlawfully obtained and or collected the full purchase price from the defendants, when they knew that they had no intention of transferring the suit property to them and fraudulently obtained from them now a sum of Kshs. 4,000,000/-, and later denied receipt of the same. Further, the defendants also pleaded breach of contract by the plaintiff for failure to apply and obtain the requisite Land Control board Consent to transfer the suit property.
  10. The defendants pray for judgment against the plaintiff, by itself, its agents, servants and or authorized representatives for: -
    - a. An order of specific performance compelling the plaintiff now the defendant herein to apply and obtain the requisite Land Control Board Consent to transfer the suit piece of land comprised in title no. Cis-Mara/ Ololulunga/ 137 measuring approximately 200 acres (82.5



hectares) or thereabouts to the plaintiffs herein and in default thereof, this honourable court does authorize its executive officer and/or deputy registrar to apply and obtain the relevant Land Control Board consents to effect transfer of the same into the defendants now plaintiffs' names.

- b. In the alternative to the foregoing prayers, a refund of the consideration price from the plaintiff now the defendant herein by herself, agents, servants and or authorized representatives based on the current market price together with damages for breach of contract.
  - c. Costs of this suit plus interest at court rates.
  - d. Any other relief that this court may deem fit to grant.
11. The plaintiff filed its reply to the defence and counter claim dated 22<sup>nd</sup> September, 2022. While reiterating the contents of the plaint, the plaintiff averred that there was no interest in land which passed from the plaintiff through to the necessary parties, as they were not the authorized agents to conduct business on behalf of the plaintiff company. Further the plaintiff averred that the defence is thus frivolous, an abuse of the court process and ought to be struck out. In reply to the counter claim, the plaintiff reiterated the contents of its plaint and further denied that the necessary parties were its agents, and that the alleged contract is void ab initio.
  12. The plaintiff contended that if there was any fraud, the defendants should have sought remedy and claim for the same against the alleged unauthorized agents. The plaintiff denied that the necessary parties are its agents, and that the sale agreement entered into was illegal as the same was never passed as a resolution, and that as a consequence, execution of the transfer documents would be fraudulent.
  13. The plaintiff's case proceeded for hearing on 17<sup>th</sup> November, 2022. Geoffrey Mungai Kubwa (PW1) adopted his witness statement dated 13<sup>th</sup> November, 2013 as his evidence in chief, and stated that he became the chairman of the plaintiff company in the year 2012. It was his testimony that the objective of the company was to purchase land, and that the previous chairman sold the land without the plaintiff's authority. PW1 produced a copy of the title deed as P. Exhibit No. 1.
  14. On cross-examination, PW1 informed the court that he had a resolution that mandated him to be the chairman, but he had not brought it to court, and neither did he have a certificate of incorporation of the company filed in court. He agreed that a company passes a resolution before it can file a suit. However, he did not file the resolution in court. He testified that the defendants entered into their land in the year 1995, which was sold by the chairman, Stephen Kiarie, in the same year, and according to him, he and others did not know that the land had been sold. It was his testimony that they only came to know of the sale later, and that they do not know the person who received the proceeds of the sale.
  15. PW1 informed the court that he heard of a company known as Ndindika enterprises, but he had not heard of an advocate known as Njiru Mbogo. He stated that Kiarie sold the land without their authority, but they have not sued him as a defendant in this case. He also said that they acquired their title deed after they placed a gazette notice, and that they also applied for leave to file this case out of time in 2013. It was his testimony that they are not willing to refund the purchase price to the defendants. Further, he stated that Kiarie lives in Kiambu in an area known as Gathanga village, and he is no longer part of the company. He stated that they have a list of members of the company which has not been filed in court. Further, that they last filed returns last year, but they have not filed it in court. Also, he agreed that he did not file any document to show that he is the chairman of the company, but that his verifying affidavit shows that he has the authority to file the suit on behalf of the company. With the testimony and evidence by PW1, the plaintiff rested its case.



16. On 5<sup>th</sup> December, 2023, Elijah Kiptonui Misoi (DW1) adopted his witness statement dated 14<sup>th</sup> December, 2021 as his evidence in chief, and produced as exhibits the documents contained in the list of documents dated 14<sup>th</sup> December, 2021 in support of its defence. DW1 testified that he does not remember when Chemaluktany was registered, and that according to him, the certificate of registration is renewable every 3 years. He testified that the society had 65 members, and that they bought 200 acres at a price of Kshs. 20,000 per acre, through a purchase agreement on 8<sup>th</sup> July, 1995 which they paid in instalments through Njiru Mbogo advocates. DW1 further testified that Njiru Mbogo issued them with receipts for every installment that they paid, as he was the advocate for the plaintiff, who was referred to them by the chairman, Stephen Kiarie.
17. DW1 stated that after paying Kshs. 4,000,000/-, they asked the company to apply for consent to have title deeds issued to them but it did not. He went on to state that Stephen Kiarie took them and their members to the farm whereupon they started cultivating, and that they are in occupation of the land as they await the issuance of the title deed. DW1 informed the court that the original title deed is under the custody of the DC Narok, and that Kiarie was involved in taking the title deed to the DC, in the presence of Njiru Mbogo, advocate.
18. DW1 could not remember the name of the DC who was in charge when the title was taken to his office. He stated that the current market value is Kshs. 700,000 per acre, which is the price they would like to be refunded plus the development they have carried out on the land.
19. On cross-examination, DW1 testified that he did not see any agency agreement between Ituiku Farmers and Njindika Enterprises. He pointed out that he had the sale agreement dated 17<sup>th</sup> February, 1995, and also stated that the one dated 8<sup>th</sup> July 1995 is between Njindika Enterprises authorized agents. He stated that there is a document showing that Ituiku Farmers had appointed Njindika as its agents, but the said agreement is not in court. He testified that the seller is Njindika, and the purchaser is Chemaluktany with a stamp of Ituiku Farmers' Cooperative Ltd.
20. DW1 agreed that they entered into a sale agreement with Stephen Kiarie, but his name does not appear in the agreement, and that the payments were made to Njiru Mbogo advocate. He was sure that the money reached Ituiku farmers, since the plaintiff showed them the farm which is the subject matter of this case. It was also his testimony that he visited the farm before they purchased it, and that paid the full purchase price. He admitted that they do not have acknowledgement of completion of the transaction, but that they tried to get consent to transfer the land to them. DW1 testified that the plaintiff showed them a resolution authorizing the sale of land but they did to give them a copy. He stated that there were minutes showing that Ituiku had agreed to apply for consent vide the letter dated 10<sup>th</sup> September, 1997 written by Njiru Mbogo advocates. He agreed that they filed a case in court at Kericho, and he was not aware whether it was dismissed for non-attendance.
21. On re-examination, DW1 testified that Stephen Kiarie was the one who instructed them to pay the purchase price though Njiru Mbogo, and Ituiku has not disclaimed that it does not know Stephen Kiarie. He said that the sale agreement is for 17<sup>th</sup> February, 1995 and is signed by 3 parties i.e. Njindika enterprise Chemalutang Farmers and Ituiku Farmers Ltd. He also said that there are 2 witnesses for Ituiku and Stephen Kiarie is one of them. He testified that the plaintiff told them that they had met and agreed to sell the land to them, and that they showed them a resolution but they never gave them a copy. He said that Kiarie has not denied that he did not receive the purchase price, and that no one has claimed that they still owe them. DW1 stated that the company has not sued Kiarie for putting them into occupation of the suit land. He testified that they went to see the farm before they purchased it, and that they were also given the title deed. He also testified that he has not been shown the proceedings



- from the court at Kericho, and he maintained that the advocate received the purchase price on behalf of the plaintiff.
22. On 22<sup>nd</sup> October, 2024, Dominique Odondi (DW2) testified that he has been a government valuer for 42 years. While producing his report dated 18<sup>th</sup> March, 2024 as DEX No. 11, DW2 testified that the property is registered in the name of Ituiku Farmers Company Limited. It was his evidence that he found 3 homesteads developed with permanent structures and about 100 semi-permanent structures, and that each of the occupants have defined portions of land. According to DW2, the value of the land is about Kshs.400,000 per acre, and the estimated value of the suit property is Kshs.81,000,000/=, including Kshs.6,111,000 for improvement, and 15% statutory/ disturbance of Kshs.12,166,650/= giving a total of Kshs.99,277,650/=.
  23. On cross examination, DW2 testified that he received the instructions from the advocate from Ituiku Farmers, and that his report is not biased against the plaintiff. He testified that in page 8 of his report, he added the replacement cost of putting similar structures, but he did not provide the current building cost index for 2023 to 2024.
  24. On re-examination, DW2 testified that he has not been shown that his report is not accurate in any way, and neither has he been shown the provision of the law that requires attaching of sale agreement. He stated that his report is based on established guidelines. He also stated that he received instructions to prepare the report from the advocate and not Ituiku.
  25. The plaintiff filed its written submissions dated 11<sup>th</sup> November, 2024. While relying on the case of Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR the plaintiff submitted that the defendant being a company itself ought to know the rules and engagements of a company being its officials, and that it would have been reasonable to conduct due diligence. The plaintiff raised two issues for determination as listed below: -
    - a. Whether the agreement dated 17<sup>th</sup> July, 1995, was signed by the officials of the plaintiff on behalf of the vendor.
    - b. Whether there was a resolution to sell the suit land.
  26. On the first issue, the plaintiff submitted that under Section 38 of the repealed *Companies Act*, the company's director, secretary or such other person had to be appointed to sign or authenticate documents, and that there was no evidence to the testimony of DW1 that there was a resolution that was shown to them for purposes of allowing the plaintiff to sell its land, in any case, the same resolution if it were in existence, ought to have been attached on the said sale agreement and produced as evidence. The plaintiff submitted that this court ought to find that the sale agreement dated 17<sup>th</sup> July, 1995 was signed by Njindika Enterprise on its own volition and not as authorized agents of the plaintiff.
  27. On the second issue, the plaintiff submitted that there was no resolution by the shareholders or members to sell the property yet the same was sold by Njindika Enterprise. The plaintiff further submitted that the sale agreement is defective as it did not have affixed to it the plaintiffs common seal contrary to Section 58 (4) of the Registration of Titles Act, Cap 28 Laws of Kenya.
  28. I have considered the pleadings, the evidence tendered and the written submissions filed by the plaintiff. The defendants did not file their written submissions. Be that as it may, and in my view, the issues for determination are as follows: -
    - i. Whether there was a valid sale agreement between the plaintiff and the defendants.
    - ii. Whether the plaintiffs are entitled to the orders sought



- iii. Whether there is merit in the defendants' counter claim.
29. On the first issue, the plaintiff contended that Stephen Kiarie who was the previous chairman sold the land without its authority. During cross-examination, certain issues were clear, and need to be addressed. It is trite law that he who alleges must prove. In this case, PW1 produced only a copy of the title deed. He did not provide the minutes or resolution of the company instructing him to file suit. It is even critical that the plaintiff proceeded to the hearing without seeing such anomaly and correcting the same. Instead, he was of the view, that the verifying affidavit accompanying the plaint indicated that he had the authority of the plaintiff to do so. In *Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000* the court held as follows:
- “It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”
30. It is no doubt that a resolution is required which is intended to address situations where some persons drag the company to court and bind the company on issues litigated yet members of the company have not sanctioned their action. The requirement is intended to protect the companies from unauthorized court processes. See *Nairobi High Court Commercial, Admiralty and Tax Division Petition No. E002 of 2023 [UR]* Between Autoports, Nairobi Freight Terminal Limited And Compact Freight System Limited -Versus- Cabinet Secretary, Ministry of Roads& Transport Cabinet Secretary, Ministry Of Industrialization, Trade And Enterprise Development, The Attorney General, Kenya Ports Authority & Siginton Freight. Bearing in mind that courts have previously held that lack of a resolution is not fatal to the suit, it is my humble view that such authorization is necessary to assure the court that the company is properly in court and that it is not an action of unauthorized members/ individuals. The reason so stated is that PW1 did not see it fit to provide a certificate of incorporation and records indicating the directors and shareholders of the company. Besides a copy of the title deed, there is nothing to show that the plaintiff is properly before this court.
31. Also, from the evidence tendered, it appears that the plaintiff threw the ball at the defendants and it turned out to be the defendants' case. PW1 in his evidence stated that Stephen Kiarie, its previous chairman, sold the suit property without its authority. No evidence whatsoever has been shown that Stephen Kiarie did not have authority. Merely stating so does not aid the plaintiff as much in this case. In their defence, the defendants produced a sale agreement which appears to have been entered into in the year 1995. The sale agreement is between Njindika Enterprises Limited, authorized agents of Ituiku Farmers Company Limited and Chemalungtany Farmers. On the execution page, signatures have been appended against the said Njindika Enterprises Limited, Chemaluktany Farmers and Ituiku Famers Limited. Whereas the plaintiff contended that there was no resolution, lack thereof does not invalidate the agreement. PW1 admitted that the said Kiarie was their previous chairman and in the absence of any evidence pointing towards his inaction, so far, there was a valid sale agreement.
32. On the other hand, DW1 produced copies of receipts of payment made to Njiru Mbogo & Co. Advocates. Also, there are the letters dated 10<sup>th</sup> September, 1997 and 16<sup>th</sup> February, 1999 respectively which confirm that the title deed was in the custody of Njiru Mbogo & Co. Advocates. As I have



understood these letters, there was intention to complete the transaction which appears to have been in the knowledge of the plaintiff who were referred to as Njindika partners. I am in doubt whether the intention of the plaintiff was actually genuine to the extent that it did not see it fit to sue the former chairman, the advocate and Njindika enterprises in these proceedings. Instead, it left this matter to the defendants as though it was their case.

33. The first issue has directly addressed the second issue. The plaintiff has in my view not discharged the burden of proof to the required standards. I am not convinced that they are entitled to the orders sought in their plaint. It is fit for dismissal.
34. On whether there is merit in the defendants' counter claim, DW2 indicated that while carrying out the valuation exercise, he noted that the occupants have defined portions of land. This goes to support their contention that the suit property was sold and subdivided to its members who are now in occupation. On a balance of probabilities, and in my view, there is merit in the counter claim dated 20<sup>th</sup> May, 2022, and the same is allowed in the following terms: -
  - i. The plaint dated 13<sup>th</sup> November, 2013, lacks merit and it is hereby dismissed with costs to the defendant.
  - ii. An order of specific performance is hereby issued compelling the plaintiff to apply and obtain the requisite Land Control Board Consent to transfer the suit piece of land comprised in title no. Cis-Mara/ Ololulunga/ 137 measuring approximately 200 acres (82.5 hectares) to the defendants herein.
  - iii. The defendants are awarded the costs of the suit.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL on this 16<sup>TH</sup> day of DECEMBER, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**16/12/2024.**

In presence of: -

Mr. Meyoki Pere – C. A

