Case Number:	Environment and Land Appeal 37 of 2019
Date Delivered:	24 Mar 2022
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Judgment
Judge:	Loice Chepkemoi Komingoi
Citation:	Chai Housing Co-operative Limited v Henry Mwangi Muchuku [2022] eKLR
Advocates:	Mr. Getange for the Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment entered in favour of the Respondent
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO.37 OF 2019

CHAI HOUSING CO-OPERATIVE LIMITED.....APPELLANT

=VERSUS=

HENRY MWANGI MUCHUKU.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Co-operative Tribunal Court

at Nairobi delivered on the 1st November 2016 by the Hobourable Chairman)

JUDGEMENT

1. The Appellant being the Respondent in the Honourable Tribunal **CTC case No. 110 OF 2010** was aggrieved by the whole decision of the Tribunal in which the Claimant who is the Respondent herein was awarded an alternative equivalent plot or compensation of not less than Kshs.1.9 Million in the event that the plot is unavailable plus costs of the suit.

2. The Honourable Chairman of the Tribunal gave the following orders:-

"1. That the Respondent is directed to allocate the claimant an alternative equivalent plot.

2. That in the event that the plot is not available the Respondent to compensate at market rates an amount not less than 1.9 million as assessed by the valuer.

3. That costs to the Claimant".

3. The Appellant being dissatisfied with the said decision has preferred an appeal dated 16th November 2016 to this court on the following grounds:-

1. That the learned Tribunal erred in failing to appreciate the triable issues raised in the Appellant's response to the statement of claim and in allowing Respondent's claim.

2. That the learned Tribunal erred in entering judgement in favour of the Claimant as against the Respondent.

3. That the learned Tribunal erred by directing that the Respondent be allocated an alternate equivalent plot or compensation at market price.

4. That the learned Tribunal erred in finding that the Respondent had proved the case on a balance of probability.

5. That the learned Tribunal erred in upholding that the Respondent was entitled to judgement against the Appellant as claimed in the statement of claim.

4. The Appellant seeks the following orders that:-

a) The Appeal be allowed.

b) The judgement and Decree of the Co-operative Tribunal at Nairobi delivered on 1st November 2016 in Tribunal case No.110 of 2010 be set aside.

c) That the claim filed in Co-operative Tribunal at Nairobi in Tribunal Case No.110 of 2010 be dismissed with cots.

5. On the 28th January 2021, the court with the consent of the parties directed that the Appeal be canvassed by way of written submissions.

The Appellant's submissions

6. They are dated 23rd April 2021.The Appellant submitted that in the year 1997, it bought fifty (50) acres of land which it subdivided into 311 plots measuring 1/8 of an acre and each plot was to be sold at Kshs.87,650/=. It further submitted that the Respondent being a member of the Appellant expressed interest to purchase 2 plots being plot Numbers C52 and C53 and was bound to comply with terms of purchase.

7. It submitted that it held deliberations concerning the suit property vide a Special General Meeting held on 21st September 1996,an annual General Meeting held on 29th May 2004 and a Special General Meeting held on 27th November 2004. He added that during the Annual General Meeting held on 13th May 2006, resolution **1:Min.AGM/9/2006** was a resolution that all members allocated plots but partially paid up should clear the outstanding dues before 30th June 2006 failure to which the plots would be repossessed.

8. It submitted that as at December 2008, the Respondent had only paid Kshs.142,000/= instead of the required Kshs.175,300/= for the 2 plots and was therefore entitled to only one (1) parcel, plot No.C52 for which he had complied and fully paid up and he was issued with a certificate of lease in respect to the plot.

9. It submitted that having failed, refused and /or neglected to pay the balance of the purchase price, the Respondent's plot C53 was affected by the resolution that all plots which had not been paid up would be repossessed thus he is not entitled to the Kshs.1.9 million awarded as compensation of plot C53 at current market value and as such.

10. It also submitted that an award would occasion it great injustice as the Respondent would be allowed to reap from his own omission. It put forward the case of **Loise M. Wambua v Kenyatta University & Another [2015] e KLR.**

11. It added that the type of remedy awarded by the Tribunal to the Respondent is an equitable one which should not have been granted because the Respondent did not meet his bargain which was to pay the entire purchase price thus he came to equity with unclean hands.

12. It submitted that the Respondent was bound its resolution regarding repossession of plots which were not fully paid for and the same could not be altered even by the learned Tribunal and that the Appellant has all along been ready to refund to the Respondent his balance less administration costs which was Kshs.54,350 as at April 2010.

The Respondent's submissions

13. They are dated 8th July 2021.The Appellant raised on the following issues for determination;

a) Whether the Respondent was issued with the title for plot No.C53 by the Appellant.

b) If the answer to 1 is negative, whether the Respondent fully paid for plot C53.

c) Whether the Appellant has advanced valid reasons leading to alleged repossession of plot C53.

d) Whether the Honourable cooperative Tribunal arrived at proper finding in CTS No.110 of 2010 whereby it ordered the Respondent to be compensated with an alternative parcel of land or in the alternative Kshs.1.9 Million.

e) Who should be condemned to pay costs of the appeal"

14. On the issue whether the Respondent was issued with title for plot No. C53, the Respondent submitted that having paid Kshs.144, 000/=, he was allocated 2 plots and was issued with an allotment certificate for plot No.C53 but the title was not issued.

15. On the issue whether the Appellant fully paid for the plot, he submitted that he paid the entire purchase price but the contention as at the Tribunal was the value of the purchase price per plot. His position backed by the Special General Meeting of held on 21st September 1996, is that the value per plot was Kshs.62,000/= plus services charges amounting to Kshs.17,000/= making the total of Kshs.79,000/=.

16. He added that in the meeting of 21st September 1996, members also resolved that; *"…Kshs.62,000/= will cater for all expenses towards the plot until you get the title deed." And further approved a service charge of Kshs17,000/= to cater for Murram roads within site, water within the site and apportioned borehole cost.= which were payable later.*

17. He submitted that he paid Kshs.144,000/= from his salary towards purchase of plots C52 and C53 but the Appellant only processed his title for plot C52 prompting him to write to the Appellant vide the letter dated 28th September 2009 reminding it to issue the remaining title for plot C53.

18. He submitted that the Appellant's contention that the purchase price per plot was Kshs.87,650/= is untrue since the resolutions of the Special General Meeting held on 21st September 1996 were not varied or revoked by the subsequent meetings of the society.

19. He also submitted that allegations that members resolved that the purchase price per plot would be Kshs.87,650/= were doctored as there was no notice attached showing that the Special General Meetings held on 13th May 2006, 29th October 2005, 21st September 1996, 25th May 2004, 27th November 2004 were properly convened pursuant to provisions of Section 27(4) of the Cooperative Societies Act No .12 of 1997.)

20. He asked the court to consider that there is no evidence of any demand notice sent to the Appellant asking him to raise any additional sum.

21. On the issue whether the Appellant advanced valid reasons leading to repossession of plot No.C53, he submitted that he paid for the value of the plot which was Kshs.62,000/= and as such there was no basis for the Appellant to repossess the Respondent's parcel of land as the annual general meeting had resolved that service charges could be paid later as it was a continuous process and the site was not developed at all.

22. It was his submission that the Honourable Tribunal arrived at a proper finding by observing that, 'The Respondent has not controverted the Claimant's testimony and evidence that other costs were only payable after issuance of a title deed." He urged the court to dismiss the Appellant's offer to refund him Kshs.47,000/= terming it oppressive and humiliating for reason that the respondent fully paid for his allotted plot 20 years ago and the value has now appreciated to over Kshs. 3 Million.

23. He cited the court of Appeal's decision in **Mwangi v Wambugu[1984] KLR 453** to submit that the Appellant had not pointed out the specific areas the Honourable Cooperative Tribunal had pronounced itself on no evidence or on wrong principle of law.

24. I have considered the Grounds of Appeal and the response thereto. I have also considered the written submissions on behalf of the parties and the authorities cited.

25. In the case of **Mwangi vs Wambugu [1984] KLR 453**, the Court of Appeal pronounced itself as follows:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence or if the impression based of the demeanor of a witness is inconsistent with the evidence in the case generally".

26. From the Grounds of Appeal. I find that the issues for determination are:-

(i) Did the Respondent pay the purchase price for Plot Number C53.

(ii) Was Plot Number C53 lawfully repossessed by the Appellant"

(iii) Whether the Tribunal erred by ordering the Appellant to compensate the Respondent with an alternative parcel of land or Kshs.1.9 Million.

(iv) Who should bear costs of this appeal"

27. It is not in dispute that the Respondent having paid Kshs.144,000/- for the two plots he was allocated Plot Numbers C-52 and C-53. A title has already been issued to the Respondent in respect of Plot C52.

28. From page 13 of the Record of Appeal there is a plot allotment certificate. It reads:-

"This is to certify that H. M. Muchuku of P. O. Box 30213 Nairobi is the registered proprietor of Plot No C-53 fully paid to Chai Housing Cooperative Society Ltd pursuant to the Bylaws of the Society".

29. It is the Respondent's case that he paid the full purchase price for the Plot at Kshs.62,000/- there was Kshs.17,000/- being service charge. This would make a total of Kshs.79,000/-.

30. He relies on a special general meeting held on 21st September 1996 in which it was made clear that the value of the plot was Kshs.62,000/-. The deliberations of the meeting were not disputed by the Appellant in the Tribunal.

31. The Appellant on the other hand contends that resolutions made by the Appellant in an annual general meeting or special general meeting were binding on the members including the Respondent whether they attended in person, by proxy or whether they chose to abscond the meeting.

32. Further that in an annual general meeting held on 13th May 2006, the resolutions of the special general meeting held on 29th October 2005 were confirmed. It had been resolved that all members allocated plots should clear the outstanding dues by 30th June 2006. Failure to which the plots would be repossessed. One had to pay Kshs.87,650/- to be declared to have paid fully. The Respondent denies notice of this resolution.

33. The Honourable Chairman of the Tribunal in its Judgment dated 1st November 2016 observed thus:-

"From the evidence on record it is evident that the Claimant was at the material time fully paid up for the two plots hence he was issued with a letter of allocation showing he was fully paid up. The Respondent has not controverted the Claimant's testimony and evidence that other costs were only payable after issuance of a title deed. This evidence remains unchallenged. In addition the Respondent has not demonstrated that it delivered notices to the Claimant, an allottee and/or served him notice of meetings and resolutions…...".

34. I find that the above observations confirm that the Respondent did not have notice of the meetings in which the deliberations were made to repossess certain plots.

35. Section 27(4) of the Cooperative Societies Act No 12 of 1997 provides that:-

"A special general meeting of a Cooperative Society shall be convened by giving at least fifteen (15) days written notice to the members".

There was no evidence placed before the Tribunal to confirm that this notice had been given.

36. I find that the Respondent had fully paid for plot No C-53 and other charges could be recovered from him in the process of issuance of Title.

37. Partially paid for plots meant that the full purchase price had not been paid. It did not cover additional charges and costs. The Appellant admitted that the Respondent had paid Kshs.144,000/- as at December 2006.

38. The Appellant was not able to prove that there was a resolution giving a deadline for payment of additional charges.

39. I find that the repossession of Plot No C-53 by the Appellant was unlawful as the plot was fully paid up.

40. I also find that the Tribunal did not err in entering Judgment in favour of the Respondent. In conclusion, I find no merit in this Appeal and the same is dismissed. The Respondent has not been able to utilize his plot for more than ten (10) years he is entitled to costs of this Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF MARCH 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Appellant

Mr. Getange for the Respondent

Steve -Court Assistant