



**Kimani & 2 others (All suing as Chairman, Secretary and Treasurer of M/s Sokango Self-Help Group) v Nyakinyua Investment Limited & 2 others (Environment & Land Case 1028 of 2012) [2023] KEELC 22445 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22445 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1028 OF 2012  
AA OMOLLO, J  
DECEMBER 20, 2023**

**BETWEEN**

**PETER KAMAU KIMANI ..... 1<sup>ST</sup> PLAINTIFF  
JANE WANJIKU ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPH MWANGI KINGORI ..... 3<sup>RD</sup> PLAINTIFF  
ALL SUING AS CHAIRMAN, SECRETARY AND TREASURER OF M/S  
SOKANGO SELF-HELP GROUP**

**AND**

**NYAKINYUA INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
MIRIAM WANJIKU KAMAU ..... 2<sup>ND</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this first vide a plaint dated 19/12/2012. They sought the court to grant them the following reliefs;
  - a. To order and declare that the plaintiffs are the legal and legitimate owners of land parcel Ruiru/ Ruiru East bloc 2/3956.
  - b. The land Registrar Thika Lands Office be ordered through the Honourable Attorney General to cancel the Title Ruiru/Ruiru East Block 2/3956 issued on the 2<sup>nd</sup> Defendant and issue a new title in favour of the plaintiffs forthwith.



- c. The 2<sup>nd</sup> defendant be ordered to yield forthwith vacant possession of land parcel Ruiru/Ruiru East Block 2/3956 to the plaintiffs and in default the plaintiffs be at liberty to evict the 2<sup>nd</sup> Defendant at her own cost.
  - d. In the alternative and without prejudice, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered to compensate the plaintiff for the land parcel in monetary terms at the current market value together with mesne profits from the year 2008.
  - e. The defendants be condemned to meet the costs of this suit.
2. The plaintiffs pleaded that they purchased land in the form of two share certificates numbers 9047 and 9048 issued by the 1<sup>st</sup> defendant which translated after balloting to LR Nos. Ruiru/Ruiru East/Block 2/3955 and 3956. It is pleaded by the plaintiffs that it twined out one of the parcels they took possession of was Ruiru East/Block 2/3954 instead of 3956 which error they apportioned to the 1<sup>st</sup> defendant who pointed out.
  3. The plaintiffs stated that they surrendered title documents to the 1<sup>st</sup> defendant on agreement that they would be given title document for Block 2/3656. However, the 2<sup>nd</sup> defendant who claims to have been issued with title deed has adamantly refused to surrender vacant possession. The plaintiff imputed collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and listed the particulars as follows;
    - a. The 1<sup>st</sup> defendant colluding and issuing the 2<sup>nd</sup> defendant with transfer documents to facilitate procurement of title document.
    - b. Colluding with the registrar at the lands office to facilities issuance of title documents.
  4. The 1<sup>st</sup> defendant opposed the suit vide its statement of defence dated 8<sup>th</sup> July, 2013 and filed in court on 22<sup>nd</sup> July, 2013. The 1<sup>st</sup> defendant denied knowledge of purchase of the laid from Wariba Mbugua by the plaintiff and denied that the plaintiff hold genuine share certificates from the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant further denied holding any balloting exercises as alleged.
  5. The 1<sup>st</sup> Defendant further denied that if plaintiff took possession of the parcels it cannot have any claim against the 1<sup>st</sup> Defendant. That it has no knowledge of the mattes pleaded in paragraphs 8 of the plaint and that it allocated and pointed out of parcels of land to its members more than 30 years ago. It also denied that the plaintiffs have capacity sue and urged the court to dismiss the suit with costs.
  6. The 2<sup>nd</sup> defendant filed her statement of defence dated 15/5/2013 on 16<sup>th</sup> May, 2013 denying the claim. The 2<sup>nd</sup> defendant pleaded that she is a bonafide allottee of land title No. Ruiru/Ruiru East/Block 2/3956.
  7. The 2<sup>nd</sup> defendant further stated that she became a paid up member of the 1<sup>st</sup> defendant in 1970 by way of share subscription. That on or about the year 1989, the 1<sup>st</sup> defendant, candidly and procedurally issued the 2<sup>nd</sup> defendant with ballot number “1554”, vide which, it allocated the subject land to the 2<sup>nd</sup> Defendant. subsequently, (in year 1989) the 2<sup>nd</sup> defendant took physical possession of the subject land where she erected a permanent residential house and besides, where she buried one of her deceased son.
  8. She pleaded that in the year 1992 the 1<sup>st</sup> defendant had processed the 2<sup>nd</sup> defendant’s title-deed for the subject land, which title-deed was issued by the Land Registrar (District Land Registry). Since the year 1989, to-date, the 2<sup>nd</sup> Defendant is the registered proprietor of the subject land, and throughout, she has been in uninterrupted agricultural and residential possession of the subject land.



9. In response to the statements of defence filed on 30/5/2015 the plaintiff pleaded that ballot No. 1554 was issued to them upon balloting and that the 2<sup>nd</sup> Defendant is occupying land which legally belongs to the plaintiff. The plaintiff also averred that the registration of the suit premises in favour of the 2<sup>nd</sup> defendant was obtained through fraudulent means as particularised in paragraph 10 & 11 of the plaint.
10. The oral hearing commenced on 28<sup>th</sup> November 2018 with each of the parties relying on the evidence of a single witness. The plaintiffs called Jane Wanjiku to give evidence in support of their case. Jane introduced herself as the secretary to the plaintiff – Sokango Self-Help Group which comprises 32 members.
11. PW stated that in March, 2008, the plaintiff purchased land measuring 2 acres from Wariba Mbugua. PW avers that Wariba showed them title documents; and gave the ballot 1554 and share certificates Nos 1624 and 2607 issued by the 1<sup>st</sup> defendant. It is her evidence that the ballot given was pink which meant the vendor was entitled to 2 acres. That the 1<sup>st</sup> defendant had plots of various sizes which were identified by ballots of various colours which were issued in 1984.
12. The plaintiff's witness continued that as at the time of purchase, the suit land had no title. That after purchase he went to the 1<sup>st</sup> defendant who confirmed that the documents given by Wariba (vendor) were genuine. Subsequently, the 1<sup>st</sup> defendant transferred the shares to the plaintiff's name and issued them with new share certificates.
13. It is the plaintiff's further evidence that after the transfer, they went to the ground with Wariba's son who pointed out the 2 acres to them. Thereafter, they subdivided the land allocated to their members. It is one of their members who constructed a house in one of the subdivisions plots who got notified that he had constructed a house belonging to the 2<sup>nd</sup> defendant's land.
14. The plaintiff stated that they were summoned by the area chief who instead returned them to the 1<sup>st</sup> defendant. That at the office 1<sup>st</sup> defendant, they were told the land they occupied belonged to ballot 1553. The matter was not resolved so they came to court. The witness produced the documents filed in support of the plaintiff's case as P ex 1 – P ex. 8.
15. During cross-examination, PW said they executed a written sale agreement produced. According to this witness, there is no difference between share certificate and the parcel of land. She was referred to P ex 4 which is a receipt for transfer of share certificate No. 2607 and P ex 5 being receipt for transfer of certificate No. 6724. PW admitted that at the time they were shown the plots, no survey had been undertaken, no maps and the plots had no numbers.
16. PW confirmed that they only undertook a search at the 1<sup>st</sup> defendant's offices. That in 2008, they entered plots 3954 and 3955 which made the owner of plot 3954 to complain to the area chief. It is their evidence that the plaintiff was told to move to plot 3955 and 3956 by the 1<sup>st</sup> defendant. PW was shown the 2<sup>nd</sup> defendant's title which was issued in 1992 before they had purchased. She also confirmed the register produced by the 1<sup>st</sup> defendant showed the 2<sup>nd</sup> defendant was the owner of LR 3956.
17. Further, the register showed Wariba as owner of LR 3955 and that 3957 bearing the name of Hanna Gathoni Mwangi has been crossed and replaced with the name of the 2<sup>nd</sup> defendant. The witness denied that they were only entitled to one single plot. She also did not know how the 2<sup>nd</sup> defendant acquired her title.
18. In further cross-examination by Ms. Kubai, state Counsel, PW said they learnt the disputed property was on sale through an agent. Later they confirmed from the 1<sup>st</sup> defendant that Wabira Mbugua was a member. She also confirmed that when they went to take possession, they found the 2<sup>nd</sup> defendant



- already in possession. That the 1<sup>st</sup> defendant has not given their clearance for the suit plot. That the 3<sup>rd</sup> defendant (Land Registrar) was sued because they issued title of the suit property to another person.
19. In re-examination, the witness said that is the 1<sup>st</sup> defendant who prepares its own register. That when they visited the 1<sup>st</sup> defendant, they were not told any of the plots had a title. That the 1<sup>st</sup> defendant's register show the 2<sup>nd</sup> defendant has double plots. She asserted that when they visited the offices of the 1<sup>st</sup> defendant, it is Hanna Gathoni who produced the ballot for plot 3957 which was a single plot, the 2<sup>nd</sup> defendant had a single plot while theirs (plaintiff) was double.
  20. She averred that plots 3954 – 3957 measures 5 acres and it was them who had 2 acres. The witness did not know the time the 2<sup>nd</sup> defendant joined the membership of the 1<sup>st</sup> defendant. This marked the close of the plaintiff's case.
  21. Robert Mugendi Mburu who is a Land Registrar testified as DW 1. He stated that the suit land is currently registered in the 2<sup>nd</sup> defendant's name and measures 0.4 ha. DW 1 produced the green card for it as D ex. 1. The Registrar also produced the green card as D ex 1 and added there is a caution lodged on 15<sup>th</sup> December, 2011 on the title by Peter Kimani who was claiming purchaser's interest.
  22. The 3<sup>rd</sup> defendants witness stated that before registering the titles in Ruiru Mugulwa Block 1, they always confirm that the allottee is a member of the 1<sup>st</sup> Defendant. In this case, the name appearing in register of members was for the 2<sup>nd</sup> defendant and he produced a copy of that register as P ex 4.
  23. On cross-examination, DW 1 stated that the suit title initially belonged to the 1<sup>st</sup> defendant who the facilitated registration in favour of the 2<sup>nd</sup> defendant. in further cross-examination by Mr. Kimani Counsel for the plaintiff, DW 1 said the suit plot was registered in 1992. Referred to paragraph 5 and 6 of the plaint which pleased that ballot No. 1554 that plot 3956 is owned by 2<sup>nd</sup> defendant. The witness stated that according to D ex 4, ballot 1554 had 3 parcels registered against it, but he could not explain why. That the plaintiff ought to have conducted a search over the suit title if they wanted to buy it.
  24. Nduta Ndirangu Chege testified as DW 2 on behalf of the 1<sup>st</sup> Defendant. She introduced herself as the director and current Chairlady of the 1<sup>st</sup> defendant. She adopted her written witness statement dated 8<sup>th</sup> July, 2017 (13) as her evidence in Chief. DW 2 affirmed that the suit parcel is owned by the 2<sup>nd</sup> defendant. She produced a copy of the register of member to corroborate her evidence – produced as D ex 5.
  25. It is her further evidence that ballot 1554 was allocated 3 plots. She stated that there were single plots of 1 acre and double plots of 2 acres. DW 2 averred that Wabira owned a single plot of one acre in ballot 1554 while the 2<sup>nd</sup> defendant owned double plot in ballot 1554. That the register was prepared in 1991 and the 2<sup>nd</sup> defendant got her title in 1992. DW 2 denied any balloting done in 2008. She further denied that they showed the plaintiff any land.
  26. She also denied that Wariba was allocated land using the share certificate number 6724 produced as P Ex 3. She stated that the suit title did not belong to Wariba hence she could not sell it. DW 2 denied any collusion with the 2<sup>nd</sup> Defendant. During cross-examination, DW 2 affirmed that P exh. 2 was issued by the 1<sup>st</sup> defendant for land mearing 1 acre. According to her, the ballot for a single plot was white while for a double plot was orange. In their register ballot 1554 was given to Wariba and the same ballot number allocated to the 2<sup>nd</sup> defendant for double plot. DW 2 admitted that since Pex. 1 was orange in colour, it was for double plot. That the 2<sup>nd</sup> defendant owns land mearing 2 acres on the ground.
  27. The 2<sup>nd</sup> defendant, Miriam Wanjiku Kamau gave her testimony as DW 3. She adopted her written witness statement as her evidence in chief together with the list of documents dated 16<sup>th</sup> February, 2021



as D ex 1 – 7 (D ex 6 – 13) and further list. It is her evidence that when the plaintiffs came to claim her land, it was already developed. That she had no dealings with the plaintiffs.

28. In cross-examination by Miss Maina, learned counsel for plaintiff, DW 3 said she does not know Wariba who sold land to the plaintiff. That she did not see the importance of the ballot because she already had a title and which formed the reason she reported the loss of the ballot only in 2011. DW 3 admitted there was two types of ballot, single and double. That her ballot was double but she could not remember the colour of her ballot. DW 3 said that when the plaintiff came to the land, she told them nothing because they were many. This marked the end of hearing.
29. The parties filed closed written submissions which I have read and considered. Flowing from the pleadings, the evidence adduced and the submissions rendered, I frame one question for determination of this dispute;
  - a. Whether the plaintiff purchased two (2) acres of land.
  - b. What orders to be given
30. There is no dispute that both Wariba Mbugua and the 2<sup>nd</sup> defendant are members of the 1<sup>st</sup> defendant. There is no dispute that both were allocated plots with the 1<sup>st</sup> defendant's land in Ruiru East Block 2. It turns out that both were allocated land vide ballot No. 1554. The 1<sup>st</sup> defendant produced an excerpt of their Register which confirms that ballot 1554 was for 3 plots.
31. The dispute is who between Wariba Mbugua (who later passed on her interest to the plaintiff) and the 2<sup>nd</sup> defendant was entitled to a doubt plot which measured 2 acres. The witness of the 1<sup>st</sup> defendant stated that their plots were allocated as single for one acre with a white ballot and double for 2 acres with an orange ballot. One then wonders why ballot 1554 which was orange would have 3 plots measuring 3 acres instead of single and double.
32. In their submissions, the Plaintiff gave the definition of fraud as given by Blacks' Law dictionary and went further to cite the case of *Insurance Company of East Africa v the A.G and 3 Others*, HCCC No 135 of 1998 which held that fraud is a matter of evidence. It follows therefore that the Plaintiff was required to present the evidence that proves the collusion amongst the Defendants. The burden of proof is on the person who alleges facts and want those facts to be determined in their favour (see sections 107-109 of the *Evidence Act* Cap 80).
33. At paragraph 11 of the Plaintiff's submissions, it is stated that the 1<sup>st</sup> Defendant sold the aforementioned piece of land to the Plaintiff while not being the owners. This submission is not true going by the evidence adduced as the 1<sup>st</sup> Defendant did not sell any land to the Plaintiff. Further, the Plaintiff averred that the Defendants through corrupt means for which the 1<sup>st</sup> Defendant was a party to deprived the Plaintiff of the suit property. They cited the case of *Ratilal Gordambhai Patel v Lalji Makanji*(1957) EA 314 which held that fraud has everything to do with ones' state of mind. However, the Plaintiff does not go further to give the fraudulent actions alluded to or how the state of mind come about when all these incidences were after they purchased the suit land.
34. The Plaintiff's witness stated that they were shown the land by the son to Wariba Mbugua. They also stated that they went to the 1<sup>st</sup> Defendant's office to confirm that Wariba owned the land she was selling which is true. The Plaintiff only mentions the action of the 1<sup>st</sup> Defendant telling them that LR No 3954 belonged to someone else which made them surrender the documents in respect of the same. Indeed, the extract of the Register of the 1<sup>st</sup> Defendant produced show the said parcel belonged to someone else. There was no contract entered between the Plaintiff and the 1<sup>st</sup> Defendant regarding their purchase of the any land within Ruiru East Block 2.



35. DW 2 who gave evidence on behalf of the 1<sup>st</sup> defendant stated that Wariba Mbugua could not have been allocated land using certificate of shares No. 6724. She added that probably Wariba purchased the said land/certificate (6724). She further denied that the ballot produced as Pex. 1 originated from the 1<sup>st</sup> Defendant despite the document being the seal of the 1<sup>st</sup> defendant.
36. The 1<sup>st</sup> defendant's witness (the Land Registrar) produced a copy of the register for the suit title which showed that the suit title was registered in favour of the 2<sup>nd</sup> defendant on 23<sup>rd</sup> November, 1992. He also produced a copy of the register of the 1<sup>st</sup> defendant's members which showed that the suit property had been allocated to the 2<sup>nd</sup> Defendant. The said register also had an entry for 3957 (not in dispute) of Hanna Gathoni Murago's name erased and replaced with the 2<sup>nd</sup> Defendant's name as owner thereof parcel 3957 was also registered under ballot 3957.
37. This court is called upon to evaluate the evidence of the orange colour of ballot 1554 in possession of the plaintiff which they say entitle them to 2 acres of land and which is the basis of their claim over the suit property. The evaluation is against the documents of title in favour of the 2<sup>nd</sup> Defendant. Besides ballot No. 1554 the Plaintiff also relied on the sale agreement executed with Wariba Mbugua on 3<sup>rd</sup> March 2008. On its face, the agreement does not disclose the size of land sold. It only mentions the share certificate numbers 2607 and 6724 and ballot 1554. Secondly, the agreement does not disclose that ballot 1554 was for double plot. The plaintiff did not join Wariba Mbugua as a party to these proceedings neither did they call her as a witness in support of their case. The Plaintiff's witness does not mention in their evidence of pleadings the whereabouts of Wariba who sold them land.
38. The Defendants availed an extract copy of the 1<sup>st</sup> Defendant's register which showed on its face that Wariba Mbugua was only allocated LR 3955 and LR 3956 was allocated to the 2<sup>nd</sup> defendant. Although the plaintiff alleged collusion between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, it did not challenge the entries in the register of the 1<sup>st</sup> Defendant produced. The crossing in the copy of register produced as E ex was in respect to parcel No. 3957 which is not in dispute.
39. Further, DW 1 produced a copy of transfer form registered on 23<sup>rd</sup> November, 1992 as D ex 2 which date is conceded as preceding the date of purchase by the plaintiffs. There was no evidence led to bring any irregularities on this document. The plaintiffs derive their ownership of land from Wariba Mbugua who was not joined as a party to these proceedings nor called as a witness.
40. The standard of proof of fraud is settled to be beyond the balance of probabilities. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court expressed itself as follows;-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....”....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
41. It is my considered opinion and I so hold that the plaintiff needed the evidence of Wariba who would have established that she was entitled to two (2) acres of land from the 1<sup>st</sup> Defendant and that she was being defrauded by the 1<sup>st</sup> and 2<sup>nd</sup> defendants of that share. This evidence was key, taking into



consideration the admission by the plaintiffs that they did not ascertain the size or boundary of the land they were buying before paying for it.

42. The 2<sup>nd</sup> Defendant stated that when the plaintiffs visited the suit land, she was already there and had obtained title. For the plaintiff's to dislodge her from the suit property, they were obligated to prove under the provisions of section 143(1) of the Registered Land Act Cap 300 (repealed) that the 2<sup>nd</sup> defendant's title was obtained – made or omitted by fraud or mistake.
43. It is my finding that the plaintiff failed to discharge the burden of proof as there is no evidence led/ produced to support the assertion that Wariba was entitled to 2 acres which was sold and that the 2 acres was comprised in parcel numbers 3955 and 3956. Further, they failed to prove that certificate No. 2607 and 6724 amounted to two (2) acres of land and in particular that the impugned 3956 formed part of the land sold to them.
44. The Plaintiff introduced a new issue of constructive trust which was not pleaded and in my view the matter did not arise from the evidence adduced by the parties. In the case of Macharia Mwangi Maina v Davidson Kagiri (2014) eKLR, the Court of appeal quoted Lord Bridge who observed in Llyods Bank Plc – v- Rosset, (1991) 1 AC 107,132, that

“a constructive trust is based on “common intention” which is an agreement, arrangement or or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman v Steadman (1976) AC 536, 540,

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

45. As already stated earlier, there was no agreement executed between the Plaintiff and the Defendants, and further the Plaintiff was never put into possession of the suit title, I find no ground to hold that a constructive trust arose.
46. The plaintiff sought specific reliefs seeking declaration that the LR No. Ruiru/Ruiru east Block 2/3956 belong to them. However, since they failed to prove that the 2<sup>nd</sup> defendant illegally and fraudulent acquired the suit title. The reliefs sought are untenable. Consequently, this court finds no merit in this suit and proceed to dismiss it with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023**

**A. OMOLLO**

**JUDGE**

