



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 282 OF 1997**

**ELIJAH WACHIURI NDURU.....PLAINTIFF**

**VERSUS**

**TIMOTHY GITHAIGA MWANGI..... DEFENDANT**

**JUDGMENT**

1. By his plaint dated 23rd June 1997 and filed on even date, the plaintiff Elijah Wachiuri Nduru sued the defendant, Timothy Githaiga Mwangi and sought the following reliefs:

*(a) A permanent injunction to restrain the defendant, his servants or employees from entering, remaining or wasting or in any other manner interfering with Plot No. A 185 (new number 231) Supili.*

*(b) General Damages for the destruction of the plaintiff's property on the **Plot No. A 85(new No. 231) in Laikipia West Farmers Co. Ltd***

*(c) Costs of the suit.*

2. The Defendant filed a defence and counterclaim where he denied the plaintiff's claim of ownership of the suit plot and by the counterclaim, the defendant claimed being the lawful proprietor of the suit land and that it was the plaintiff who was the trespasser thereon since March 1994. He therefore sought a declaration that he was the sole and lawful proprietor of the said **Plot No. 231** and an order of eviction and *mesne* profits.

In his reply to the counterclaim dated the 11th August 1997, the plaintiff denied the defendant's claim of ownership and being a trespasser. He urged dismissal of the counterclaim with costs.

3. On the 4th December 2003, the whole case was dismissed for want of prosecution. The defendant however applied for reinstatement of the counterclaim and the same was reinstated for hearing. The Defendant urged his claim by calling four witnesses. The plaintiff called three witnesses in support of his reply to the counterclaim and his entitlement to the suit plot.

4. Both parties claim to be the lawful proprietors of the suit plot, having been so allocated by the Laikipia Farmers Co. Ltd upon payment of the necessary allotment fees and/or share capital to the said company. Both produced documents to support their respective claims of ownership of the disputed plot.

The court is therefore to consider the Evidence tendered by both parties, the pleadings and the relevant

legal provisions to determine the rightful and lawful proprietor of the **Plot No. A 185(new number 231)**, and among them to determine who is the trespasser.

## 5. Defendant's Evidence

The Defendant testified as DW1. It was his testimony that he paid a sum of Kshs.20/= as registration fees and Kshs.1,500/= share capital to Laikipia West Farmers Company Limited (hereinafter referred to “as the company”) on the 29th May 1974 and produced receipts in support. He also paid survey fees of Kshs.200/=and upon balloting **Plot No. A 185** was allocated to him. Both the ballot and Plot number were produced as exhibits. Later, the plot was given a different number 231 by the surveyors. It was his testimony that he started tilling the land but was not staying in the property. He testified that in 1994, he found that the plaintiff had entered the plot and upon inquiry was informed by the plaintiff that he had purchased the plot from the company. He reported the dispute to the District Officer (D.O) Rumuruti, upon which the D.O responded by letter that records in the office indicated that the rightful registered owner of the plot was himself, but invited the plaintiff to prove his ownership. Both parties were summoned to the D.O's office but no solution was reached.

He testified that thereafter he filed a case **Nyahururu PMCC No. 428 of 1994** where upon the court referred the dispute to the Land Disputes Tribunal that made a finding that the suit plot belonged to the Defendant. The defendant further testified that he later obtained a title to the plot being **Sipili/Donyoloioip Block 1/231** which he still holds as the registered owner.

6. DW2 was John Njoroge Macharia, and Executive Assistant at Nyahururu Law Courts. He produced the court file in respect of **PMCC No 428 of 1994** – a case between the two parties. It was his evidence that the case was referred to the Land dispute Tribunal, and also confirmed the application by the plaintiff of an injunction that was dismissed. He confirmed that there was no concrete decision by the court over the dispute.

7. DW3 was Jane Macharia, an Assistant County Commissioner, Rumuruti Ward, Laikipia County. She produced two Registers for the paid up members of the Laikipia Farmers Company Limited. It was her testimony that the plaintiff's name was not in the original register of members but was later inserted and were written in ink while the defendants was typed, but cancelled, and that she did not know who or how it was cancelled.

On cross examination, she stated that if something is cancelled, it means it no longer exists, and confirmed that both registers had several cancellations of names, and that from the registers she could not say who the owner of the plot was, nor could she explain why the Government was issuing payment receipts to members or purchasers of the land.

8. **The plaintiff's evidence** was that he was allocated the suit **Plot No. A 185 (new number 231)** in 1988 when he paid a sum of Kshs.1720/= to the company after he heard the company was selling plots. He testified that he went to the D.O's office at Rumuruti where upon payment of the above sum was issued with a receipt(produced as exhibit). That the company surveyor showed him the plot and placed beacons and immediately started development. He testified that the plot was virgin land and in 1991 he built a house and planted trees then moved in with his family. In 1989, he was called to the D.O.'s offices where he was given a New number to the **Plot. No 231**, and also filled forms for application for a Title Deed. It was his further testimony that in 1994, the D.O asked him to take documents to his office to prove ownership of the plot after a complaint was lodged by the Defendant which he did. He confirmed that no solution was reached leading to the cases in Nyahururu court and the Judicial Review application and eventually this case.

It was his testimony that since 1991, he has been in occupation of the said land with his family, but was not given a Title Deed due to the dispute of ownership.

He testified that the Defendant had no dispute on how he was allocated the plot and was satisfied that he had paid the requisite charges to the D.O.'s office and that the receipt issued by the D.O's office was

genuine.

9. The plaintiff stated that the defendant had never cultivated the land before he took possession as there was no human activity thereon, and never saw any signs of cultivation.

On the company registers, it was his evidence that his name was written by hand in the original Register of members (DExh 12), that the entry was made by the company and did not chose the plot that he was allocated and shown after payments. He confirmed that the Defendant's name had been cancelled and replaced with his, but said that he had nothing to do with the entries. He told the court that he defendant never lived in the plot.

It was his evidence that the plot was rightfully allocated to him, and therefore is not a trespasser, and has nothing to pay the defendant.

On cross examination, he stated that everybody was paying for the plots at the D.O's offices and were issued with government receipts, for the purchase of the land and the receipts were shown as share capital for the company.

He stated that it was the Government Surveyor who was showing all the people their plots allocated to them by the company, and said he did not know what arrangements the company had made with the D.O's office/Government in respect of the sale of the plots of the company.

10. On the second members Register (DExh 12) he testified that he did not know his name was not indicated nor did he know that it had the defendant's name. **PW2 James Mwangi Mwatha** testified that he lives at the Sipili in his land at the Laikipia Farmers Company Ltd who gave him the plot. It was his testimony that upon balloting, some people failed to take possession of their plots for reasons that they had many stones and the soil was not fertile, so they were given alternative plots. He gave a background of how the Government (District Officer) got involved in the sell of the plots, that after complaints is by members, the D.O. and the company resolved that plots that members of the company did not take up, be sold to members of the public who were willing to purchase. It was then that the plots, were marked "GK" and these are ones that none members were allowed to purchase. It testified that there was a register of the people who bought the "GK" plots and the register was taken to the D.O's office at Rumuruti and that he did not know reasons for alterations on the registers (DExt 12, A and B).

11. On crossexamination, the plaintiff stated that as a clerk at the D.O's office, he knew of members complaints in 1985 and that the D.O's offices at Rumuruti and Ng'arwa were working together, that the complaints were on double allocations and the process of allocation of the plots was not transparent and that all were handled at the D.O's offices.

He also confirmed that there were plots that the company did not give out and were marked "GK" and members of the public were invited to purchase the "GK" marked plots. He also confirmed that the purchases were done from the D.O's office at Rumuruti and Ng'arwa. He stated that he was one of the clerks who were receiving money from the public and issuing receipts from the D.O's office for the plots. He also confirmed that the receipts issued to the purchasers were government receipts and the money was being taken to the District Commissioner's Treasury accounts. He testified that he knew the plaintiff as he used to live in the plot with his family but could not confirm which *shamba* he bought or was allocated.

On the cancellation in the registers, he testified that the company used to write in hand, after cancelling the original allotees names.

Shown the receipts paid by the parties, he confirmed that both the plaintiff and Defendant paid the same amounts Kshs.1,720/= and therefore were entitled to plots.

12. PW3 David Gitau Kihuto testified that he bought his plot from the the company in 1988 after paying a sum of Kshs.1,720/= at the D.O.'s office and shown the plot by the Government Surveyor. Since his

plot had no dispute, he was issued with a title deed. He stated that plots marked "GK" were the ones sold to none members, and the company was the one that chose which plot to allocate someone. He clarified that the receipt issued from the D.O's office was a government receipt but showed as share capital for the company. He testified that he attended all the company meetings where the resolution for the sale of plots to none members were made. He testified that in the Register (DEx12), his name was written in pen after a cancellation of another name, that he did not know the original allottee. He further testified that exchange of plots was normal and many people had exchanged their plots but did not know whether the defendant had exchanged his. He confirmed that the plaintiff was living in the plot with his family since 1986 when he knew him.

### 13. Analysis of Evidence

From the evidence tendered before the court and the numerous documents produced, the issues that arise for determination others are:

1. *Where the plaintiff and the Defendant members of the Laikipia Farmers company Limited?*
2. *Whether **Plot No. A 185**(New No. 231) was allocated to the plaintiff or the Defendant by the company.*
3. *What role the Government played in the plot allocations in the Laikipia Farmers Co. Ltd*
4. *Who is the rightful and lawful proprietor of the suit plot **No. A 185**(New No. 231)*
5. *Whether the defendant is entitled to the prayers in its counter claim?*
6. *Costs.*

14. The Defendant and the plaintiff filed written submissions. I have considered the pleadings, the evidence and submissions by counsel.

The following facts are not in dispute.

1. *That the Defendant was allocated the subject plot by the company in 1974 after payment of Kshs.1,720/= being share capital and survey fees.*
2. *That the plaintiff was allocated the same subject plot by the Company through the District Officers (D.O.) office in 1988 upon payment of Kshs.1720/= to the company being share capital and survey fees.*
3. *That the plaintiff has been in possession together with his family and has developed the plot since 1991.*
4. *That the defendant did not occupy the suit plot and has never been to the plot since 1997.*
5. *That both defendants names and plaintiffs names appear in the company's registers, and therefore are shareholders of the company.*
6. *That both parties paid Ksh.1,720/= being share capital and survey fees to the company and both have the receipt, the defendants from the company, and the plaintiffs issued by the D.O's office but for share capital of the company.*
7. *That after disagreements arose between members of the company and its directors, the government took over the management of the company.*

8. *That the company registers bore members names, some cancelled and replaced with others.*

9. *That none of the parties chose the plot to be allocated but the surveyor was the allocating party after balloting.*

10. *That the company registers were being filed and/or cancelled by the company without any of the allottees involvement.*

11. *Each party claims to be the lawful allottee and proprietor of the suit plot.*

15. The defendant's evidence echoes the above undisputed facts and events upto the period of the suit 1997. The court shall interrogate issues between the parties concerning the suit plot upto the period 1997.

16. There is no dispute that the defendant became a member of the company upon payment of Kshs.1,500/= as membership fees on the 29th May 1974 as evidenced by receipts DExt1 and 2 and thereafter allocated the plot in issue.

Likewise, the plaintiff too became a member of the company when he paid the share capital to the company and his name entered in the company registers in 1988.

Given the above scenario, the court will proceed to interrogate the legality or otherwise of the double allocation of the same plot to both parties. Evidence tendered show clearly that none of the parties were involved in any fraud or illegal acts. They both acknowledge having had no influence or involvement in the method of allocation.

It is evident that both parties paid valuable consideration to the company, the defendant, directly to the company and the plaintiff through the D.O.'s office but for the benefit of the company. Receipts issued to both testify to that fact.

17. It is important to state at this stage that as the plaintiffs suit was dismissed for want of prosecution, pleadings thereof cannot be considered. He had however filed a reply to the counterclaim, denying the defendants ownership of the suit plot and being a trespasser thereon. That is what forms the basis of his claim upon the suit plot.

It is trite that a court shall be guided by the parties pleadings, and in this case the defendants counterclaim and the plaintiffs defence to counter claim. This was stated in the case **Associated Electrical Industries Ltd vs William Otieno HCCC No. 421 of 1998.**

18. The Defendant submits that no evidence was led by the plaintiff that money was ever paid to the company as it was then in existence. It is also submitted that what the plaintiff paid was share capital and not purchase price for the plot. It is further submitted that as the plaintiff paid the share capital to the Government through the District Officer, he could not have been allocated a plot by the company.

The defendant submitted that no evidence was led that the company had constituted the Government to collect share capital from members on its behalf under any arrangement. That being the defendants position, it was submitted that the plot was lawfully allocated to the defendant by the company and was not available for sale or allocation to the plaintiff in 1988.

Invoking the law of contract, the defendant submitted that there was no consideration paid by the plaintiff for the plot.

19. For the plaintiff, Mr. Adere Advocate submitted that the plaintiff was also a shareholder of the Laikipia Farmers Company Limited by payment of share capital and being issued with a receipt for share capital by the D.O's office. It was submitted that he was shareholder just like the defendant and therefore entitled to a share that translated into allocation of one plot of five acres. It was stated in evidence by

PW3, David Gitau Kihuto, who was then working in the D.O.'s office in the year 1988 that when disagreements arose between the members of the company the Government intervened particularly in the allocation of the land parcels. That in meetings called by the District officers of both Ng'arua and Rumuruti Divisions jointly with the Directors of the company, it was resolved that the plots be sold to any member of the public who wanted to buy through the D.O.'s offices at Rumuruti and Ng'arua. It was his evidence that a share was equal to a five acre plot and was to be sold at Kshs.1,720/=. He further testified that he himself bought a share for the same amount and was allocated a five acre plot where he lives.

This evidence was not challenged at all and therefore remains uncontroverted. From this evidence, it was shown how the Government got involved through the office of the District Officer (D.O).

20. I decline to agree with the Defendant's submissions that the Government having not been the owner of the land could not sell or allocate plots to any member of the public. The receipt issued to the plaintiff by the D.O's office clearly indicated **"Share capital for Laikipia Farmers Company Limited."** I am persuaded that the D.O's office was authorised, though not expressly, by the directors of the company to assist it by collecting funds and allocating plots to members of the public. Indeed PW3 used the same mode of payment and was allocated a plot just like any other member, and no problem arose.

It is not in dispute that following the arrangement between the company and the D.O's office, the company books and registers were kept in its office. DW3, the Assistant County Commissioner, Laikipia County Confirmed that all the company registers and lager books were kept in the

D.O's offices. The company books and registers could not have been kept in the D.O's offices unless there were mutual arrangements and an agreement by the company and the Government.

The court therefore finds that all payments made for share capital, plot allocation and survey by members of the public through the D.O.'s office and evidenced by issuance of Government receipts for the company were genuine and properly so done, and were legally done.

The court further proceeds to make a finding that the plaintiff's receipt for Kshs.1,720/= as genuine as the defendant's receipt for the same amount, and that each was entitled to allocation of a five acre plot within the company's land in the farm.

21. I have stated that none of the parties alleges fraud in the manner of the allocation of the plot. The question that arises then is how the Defendant's name was cancelled and plaintiff's name inserted as the allottee of **Plot No. A 185**.

It is submitted by the defendant that the said plot having been allocated to the defendant was not available for reallocation to the plaintiff.

In his evidence, the defendant confirmed that after the allocation, he never lived in the plot, and there were no conditions attached to the allocation. He stated that he was not aware of any conditions attached to the allocation, and that he was not aware that those allocated the land were supposed to live thereon. He also stated that he was not given notice of repossession of the plot, did not know when the cancellation of his name from the register was done, and that he did not sell his plot.

In the **Edward Warutere Murugaru vs Ezekiel Kinya Wamugu & 5 Others (2011) e KLR** the court held that an allocation by a land buying company in the absence of fraud, is considered sacrosanct and the allottee is considered to have proprietary rights over the plot. However, the plaintiff in the above case did not produce any evidence of payment to the company for the plot. The court found in favour of the Defendant after making a finding that the defendant was a member of the land buying company and had paid to the company. It appeared that the plaintiff had paid to the officials of the company, and in the words of the Judge **"The plaintiff was messed up by the officials of the land buying company."**

It is evident that the facts of the above case are distinguishable from the facts in this case. The plaintiff's

payments did not reach the company.

22. In the present case there is no evidence whatsoever that the plaintiff's payment did not reach the company. The court in the above case wondered why the plaintiff did not enjoin the company as a party to the suit. Thus when the plaintiff's counsel submits that the defendant had picked the wrong party to bring to court by its counterclaim, and failed to enjoin the company, I am persuaded to agree to that submission, and that if the D.O. before whom the complaint was taken to before filing of the suit had found the defendant's allocation of plot not genuine, he would have caused his eviction but that did not happen.

23. The plaintiff had been factually and effectively on the land tilling, farming and has developed the same since 1991.

The defendant has never stepped foot thereon since 1997. There being no fault or fraud attributed to the defendant or to the plaintiff and since none of the two parties enjoined the real culprits – the company and the Government (D.O.) as parties to the suit, this court cannot lay blame or fault to either.

It is admitted that the defendant became aware that this plot had been allocated to the plaintiff in 1994. The company was in existence then. He failed to take it up with the directors of the of the company who would have answered the issue of double allocation. The plaintiff was already in occupation and developed the plot. He opted to sue the plaintiff. It is evident that the plaintiff was a *bona fide* purchaser for valuable consideration, so is the defendant.

The defendant cited the case of **Ann Wanjiru vs Mwhaki and 2 Others (2007) e KLR**. In that case, the court held that the first allottee of the plot was the lawful proprietor of the land, for the reason that the name of the defendant (2nd allottee) did not appear in the land buying company's register as shareholder.

This case is distinguishable from the present case. Both the plaintiff and defendant are shareholders and *bona fide* purchasers for value of the plot in dispute.

In **Nyandarua Progressive Agencies Ltd vs Grace Wambui Njoroge (2013) e KLR**, the company had attempted to dispose the appellant who was a member by purchase of a share and allocated the land. She took possession and developed it, planted coffee, bananas, sugarcane and other crops. The High Court held that the company could not evict her.

On appeal, the Court of Appeal upheld the High Court's decision.

This authority supports the plaintiff's claim of ownership of the plot in issue. Since allocation in 1988, the plaintiff took possession, proceeded to develop, cultivate and built his home thereon where he lives with his family. On the other hand, the defendant though allocated the same plot, it appears to be and upon consideration and evaluation of the evidence tendered, that the defendant upon his own admission, that the defendant never lived on the plot nor developed the same. None of his witnesses testified that he did any development on the land prior to 1991 when the defendant settled on the plot a fact confirmed by the plaintiff's witnesses who were also allottees of their plots though the D.O.'s office and having receipts from the government, but payments of share capital to the company. These witnesses confirmed that the plaintiff is their neighbour and they know the developments thereon.

24. In the case **Waas Enterprises Ltd vs City Council of Nairobi & Another (2014) e KLR**, a similar situation was in question. The council had allocated a plot to the plaintiff and reallocated the same plot to the defendants. The plaintiff was allocated the plot in 1999 and the 2nd defendant in 2000. The Court, Odunga J, rendered himself that:

***“ The law to my understanding is that once the suit property has been allotted to someone. It is not available for allocation to another person unless the allotting body cancels the allotment”***

Evidence adduced by the parties hereto is that there were numerous cancellations of members' names

against their allotted plots by the company and that the company used to write names of allottees of plots in ink, handwriting, and that the Defendant's name was cancelled from the company register in ink. It is evident therefore that it is the company that did the allocations, entered the members in their registers and also cancelled the plot allocations from one person. The courts finds that it is the company that cancelled the defendant's name and entered the plaintiff's name in the register.

25. The mode of allotment of these plots was not challenged by the parties.

This court subscribes to the findings by the learned Judges, in the authorities cited above that once a plot has been allocated to a party by a land buying company, it is not available for reallocation to another, **unless the allotment has been cancelled by the same person, the allocating body.** (underlining mine)

It is a further finding that the plot was allocated to the plaintiff by the company, and his name entered in its registers, and there having been no cancellation by the company of his name, the plaintiff is the lawful proprietor of the plot in dispute **A 185 (New No. 231)** Sipili. This decision is informed not by blame on any of the parties but on the fact that the defendant upon allocation of the plot never occupied or developed the plot. On the other hand, the plaintiff upon allocation took effective occupation and possession and developed the plot where he has been living with his family since 1991. Between the two, the plaintiff would be more prejudiced if an order of eviction were to be issued against him and for nor fault of his.

Having so determined it is evident that the plaintiff is not a trespasser on the said plot. It follows therefore that the declaration sought in the counterclaim that the defendant is the lawful proprietor of the suit plot cannot be granted. The claim for *mesne* profits automatically fails. In his defence to the counterclaim, the plaintiff sought dismissal of the counterclaim with costs. The counterclaim is dismissed.

26. **Section 27 of the Civil Procedure Act Cap 21 Laws of Kenya** gives the court power to give directions on an award of cost. It is upon the discretion of the Court, due regard to circumstances of each case and for good reasons otherwise than the norm, that costs ought to follow the event.

I have stated above that both the plaintiff and the defendant were *bona fide* allottees of the suit plot by the Land buying company and no fraud could be attributed to any of them in the cancellation of the defendant's name from the allotment register of the company. That as it may, the defendant did not follow up the issue of cancellation with the company when it existed, thus gave the plaintiff uninterrupted and peaceful occupation of the suit plot from 1991 to the present. The plaintiff has since then been enjoying the developments in the said plot.

For those reasons, and in its discretion, the court directs that each party bears its own costs of this suit.

27. The upshot of the above and for reasons stated, the defendants counter claim dated 24th July 1997 is dismissed, and the plaintiff is declared the lawful proprietor of **Plot No. A 185 (New Number 231) Sipili.**

Each party shall bear its own costs of the suit.

**Dated, signed and delivered in open court this 27th day of July 2016.**

**JANET MULWA**

**JUDGE**