



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 763 OF 2015**

**ALBERT KIHIANYU GIKARIA.....PLAINTIFF**

**=VERSUS=**

**MARARUI FARMERS COMPANY LIMITD....1<sup>ST</sup> DEFENDANT**

**SAMMY NJOROGE MAINA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plant dated 15<sup>th</sup> June 2005 the Plaintiff seeks judgment against the Defendant jointly and severally for:-

*(i) An order that the Defendants do forthwith execute the necessary transfer of the said premises to the Plaintiff.*

*(ii) An order that the Defendants forthwith give vacant possession of the premises to the plaintiff.*

**In the alternative**

*(iii) The Defendants adequately compensate the plaintiff for the premises at current market rate.*

*(iv) The defendants pay costs and interest at court rates.*

2. Upon being served with summons to enter appearance and copies of plaint the 1<sup>st</sup> Defendant entered appearance through the firm of M/S Muchui & Co. Advocates, on the 5<sup>th</sup> August 2008. It also filed a statement of defence dated 10<sup>th</sup> August 2005 denying the allegations of fraud by the Plaintiff. It stated that the plot in question belongs to the Plaintiff.

3. The 2<sup>nd</sup> Defendant entered appearance through the firm of Indech & Associates Advocates on the 10<sup>th</sup> August 2005. He also filed a statement of defence dated 10<sup>th</sup> August 2005 denying each and every allegations in the plaint. It is his case that the Plaintiff is fraudulently attempting to acquire his plot.

4. In paragraph 7 of the defence, the particulars of fraud against the Plaintiff are stated as:-

*(i) A false claim by the Plaintiff that he bought the plot from one Charles Ayora whereas the said Ayora has never been allocated the plot the same having been allocated to John Thairu Ngugi who transferred it to the 2<sup>nd</sup> Defendant.*

*(ii) Colluding with officials of the 1<sup>st</sup> Defendant to secure a fake/false ballot papers so as to use the same as a basis for claiming the 2<sup>nd</sup> Defendant's land.*

*(iii) Colluding with the 1<sup>st</sup> Defendant's officials and attempting to interfere with records regarding the land in dispute.*

*(iv) Falsely laying a claim to the 2<sup>nd</sup> Defendant's property.*

**The Plaintiff's case**

5. It is the Plaintiff's case that he bought 75 ordinary shares worth Kshs.39,000 in the 1<sup>st</sup> Defendant's company from Charles Nyambesa

Ayora who was a shareholder on 18<sup>th</sup> March 1992. He paid Kshs.1000 being transfer fees and was issued with an official receipt. He was also issued with a yellow card No 751 and a ballot paper No 338. On 18<sup>th</sup> October 1992, the said shares were officially transferred to him by the 1<sup>st</sup> Defendant in the presence of District Officer Kasarani. The said Plot No. 338 was later registered as Nairobi/Block 139/723 and he pays rates to date.

6. In 1992 the 1<sup>st</sup> Defendant's surveyor showed him the beacons after which he surrendered the yellow card. In the year 2000 he was shocked to discover that someone had encroached on his plot and put up an illegal structure hence this suit.

#### **The 1<sup>st</sup> Defendant's case**

7. The 1<sup>st</sup> Defendant is a stranger to the alleged sale of the suit property to the 2<sup>nd</sup> Defendant. Further that according to its records the plot in question belongs to the Plaintiff and at no time has the 1<sup>st</sup> Defendant sold or transferred the ownership or given possession to the 2<sup>nd</sup> Defendant.

#### **The 2<sup>nd</sup> Defendant's case**

8. That he is the registered owner of Nairobi/Block 129/723 lawfully in possession of the same and has substantially developed it. Further that the plot had never belonged to Charles Ayora but to John Thairu Ngugi before it was transferred to him (2<sup>nd</sup> Defendant).

#### **Evidence of the Plaintiff**

9. PW1, Albert Kihianyu Gikara testified on 26<sup>th</sup> September 2019. He adopted his witness statement dated 21<sup>st</sup> July 2015 as part of his evidence in this case. He also relied on the bundle of documents. He told the court that he bought 75 shares from Charles Nyambesa Ayora who was a shareholder of the 1<sup>st</sup> Defendant. He bought the same for Kshs.39,000/-. The shares were transferred to him by the 1<sup>st</sup> Defendant on 18<sup>th</sup> October 1992 upon paying Kshs.1000/- being transfer fees. He was issued with a receipt No 184.

10. He was shown the beacons of the plot by the 1<sup>st</sup> Defendant's surveyors. He balloted for the plots and his plot number is 338. He produced the original ballot as exhibit in this case. He was also given a yellow card No 751 which was retained by the surveyor after he showed him (Plaintiff) the beacons of the plot. He took possession of the plot and showed his wife.

11. After a year he went to the plot and found somebody developing it. This was in the year 1994. He reported the matter to the 1<sup>st</sup> Defendant who confirmed the plot was his. The 2<sup>nd</sup> Defendant has put up a stone building. He wrote a demand letter to the 2<sup>nd</sup> Defendant to stop encroaching on his plot but he did not heed.

12. He produced a letter from the 1<sup>st</sup> Defendant confirming that he was the owner of the plot as exhibit in this case. The letter is dated 26<sup>th</sup> May 2003. He further stated that his Plot No. 338 was registered as Nairobi/Block 139/723. He said he does not have a Title Deed as he was waiting for this case to be finalised.

13. It is his case that the 1<sup>st</sup> Defendant has not facilitated him to obtain a title deed. He prays that it be compelled to sign the necessary documents to effect transfer. He also prays that the 2<sup>nd</sup> Defendant be evicted from the suit property.

14. When cross examined by Mr. Mege for the 1<sup>st</sup> Defendant PW1 admitted that the 1<sup>st</sup> Defendant concedes that the suit property belongs to him (Plaintiff). He also admitted that the 2<sup>nd</sup> Defendant is a trespasser in his plot.

15. When cross examined by Mr. Oundu for the 2<sup>nd</sup> Defendant he told the court that he is the one who balloted for the plot. He also stated that the 2<sup>nd</sup> Defendant continued constructing despite being asked by the 1<sup>st</sup> Defendant to stop. He admitted there is now a complete building.

#### **Evidence of the 1<sup>st</sup> Defendant**

16. DW1 Mary Wangui Mburu one of the directors of the 1<sup>st</sup> Defendant testified on 28<sup>th</sup> January 2020. She adopted her witness statement dated 27<sup>th</sup> January 2020 as part of her evidence in this case. She also relied on the bundle of documents. She told the court that Plot No 338 was registered as Nairobi/block 139/723.

17. That as per the register kept by the company the owner of Plot No 338 is Albert Kihianyu Gikara (Plaintiff). She produced the register as exhibit D1 in this case. She told the court that the 1<sup>st</sup> Defendant only issued one letter of allotment in respect of plot Number 338 to the Plaintiff and not to Summy Njoroge Maina.

18. When cross examined by Mr. Oundu for the 2<sup>nd</sup> Defendant she told the court that she does not keep records of the company. She confirmed that the 1<sup>st</sup> Defendant has never had its offices in Hurlingham. She also confirmed that Plot Number 338 belongs to Albert Kihianyu Gikara (the Plaintiff). She also stated that she was not sure if John Ngugi was a shareholder.

19. When cross examined by Mr. Gaita for the Plaintiff, she confirmed that the register produced is in respect of all the plots belonging to the 1<sup>st</sup> Defendant since inception. She also told the court that Plot No 0338 did not exist and that an accountant could not confirm of

ownership of any plot on behalf of the 1<sup>st</sup> Defendant. it was only the Chairman who could confirm ownership.

### **Evidence of the 2<sup>nd</sup> Defendant**

20. DW1 Stella Muthoni Wanjau, the wife of the 2<sup>nd</sup> Defendant testified on 1<sup>st</sup> March 2021. She was substituted after the 2<sup>nd</sup> Defendant passed on. She is the administrator of the estate of the late Sammy Njoroge Maina. She adopted her witness statement dated 16<sup>th</sup> November 2019 as part of her evidence on this case. She also relied on the bundle of documents. They were produced as exhibits in this case.

21. She told the court that her late husband bought plot No 338 from John Thairu Ngugi on 30<sup>th</sup> March 1993. She said she did not know the said John Thairu Ngugi but her husband told her about him. She further stated that she did not participate in the said transaction but she contributed money towards the said purchase. She produced a copy of the sale agreement as an exhibit in this case. That her husband paid Kshs.2000 to the 1<sup>st</sup> Defendant and his name was inserted in the register of owners and or members.

22. Her husband was issued with a receipt. Later John Thairu Ngugi showed them the plot which they fenced in July 1993. She told the court that they have constructed a three bedroom house which is almost complete but there is a tenant in occupation.

23. She further stated that the Plaintiff started laying claim to the plot in 2001. She told the court that the plot does not belong to the Plaintiff. She prays that the suit be dismissed with costs.

24. When cross examined by Mr. Gaita for the Plaintiff she admitted that her husband bought Plot No. 0338. Further that the drawer of the sale agreement is not stated. She also admitted that the transfer dated 30<sup>th</sup> March 1993 stated Plot No 338 but the plot they bought was 0338.

25. When cross examined by Mr. Ndegwa for the 1<sup>st</sup> Defendant she confirmed that the 2<sup>nd</sup> Defendant does not appear as the owner of Plot NO 338 from the register. She also confirmed that she did not have approvals from the Nairobi City Council showing approval for construction on Plot No 338. She also said she had no receipts in court to show that he was paying rates for the said plot.

26. DW3, Dennis Kibuthu Wanjau, the 2<sup>nd</sup> Defendant's brother in law testified on 9<sup>th</sup> June 2021. He told the court that he met John Thairu in January 1993 who wanted to sell his shares in the 1<sup>st</sup> Defendant's company. He introduced the said John Thairu to the 2<sup>nd</sup> Defendant. They went and saw the Plot Number 0338 which the 2<sup>nd</sup> Defendant paid for. He started construction in March 1993.

27. DW3 stated that he supervised the construction which is now complete. He stated that he had not heard of any claim by the Plaintiff until this suit was filed in court. When cross examined by Mr. Ndegwa for the 1<sup>st</sup> Defendant he admitted that the 2<sup>nd</sup> Defendant bought Plot NO 0338.

28. At the close of the oral testimonies, parties tendered written submissions.

### **The Plaintiff's submissions**

29. They are dated 17<sup>th</sup> October 2021. The Plaintiff submitted that the 1<sup>st</sup> Defendant produced its original register of members which showed that the suit **plot No.338** belongs to the Plaintiff and admitted that it was ready to effect a transfer to the Plaintiff.

30. He also submitted that that the 2<sup>nd</sup> Defendant through his wife Stella Muthoni Ngugi was unable to prove that he bought the suit plot from one John Thairu Ngugi as the said John Thairu Ngugi does not appear in the original register of members of the 1<sup>st</sup> Defendant.

31. He added that the allocation receipt dated 29<sup>th</sup> September 1990 allegedly issued to John Thairu Ngugi is for **Plot No.0338** which the 1<sup>st</sup> Defendant stated that it does not exist in its records. He further submitted that the transfer by John Thairu Ngugi to the 2<sup>nd</sup> Defendant was purportedly for plot No.338 which belongs to him.

32. It was his submission that he has proved to the required standard that he is the bona fide proprietor of **NAIROBI/BLOCK 139/732** formerly **Plot No.338** and he is therefore entitled to all ownership rights and an order of vacant possession.

33. It appears the 1<sup>st</sup> Defendant did not tender written submissions.

### **The 2<sup>nd</sup> Defendant's submissions**

34. They are dated 24<sup>th</sup> June 2021. Counsel for the 2<sup>nd</sup> Defendant submitted that the distinction sought to be made by the Plaintiff that the numbers **338** and **0338** are two different plots is misleading as in numerical language and sense, it is one and the same thing as demonstrated by the bulk of the documents produced by the parties where the numbers are used interchangeably.

35. He also submitted that the 2<sup>nd</sup> Defendant demonstrated the process by which Sammy Njoroge Maina (deceased) acquired the suit property in dispute by demonstrating that John Thairu Ngugi, the original owner shareholder sold his stake as exhibited by the sale agreement, a membership payment receipt for payment for shares, a transfer of shares/ stock, a ballot card, a receipt for survey fees, allocation of shamba plot card (yellow card) and a receipt for payment of transfer fees paid to the 1<sup>st</sup> Defendant by the late Sammy Njoroge Maina. He added that the 1<sup>st</sup> Defendant also issued the late Sammy Njoroge Maina with a letter confirming his proprietorship **of plot 338** on **L.R. NO. 3762 RUARAKA NAIROBI** dated 8<sup>th</sup> July 1993 together with the application form for approval of plans.

36. He contrasted the confirmation letter dated 8<sup>th</sup> July 1993 showing that **plot 338** belongs to Sammy Njoroge Maina with the letter produced by the Plaintiff dated 26<sup>th</sup> May 2003 showing that **plot 338** is in the name of Albert Kihianyu Gikaria and asked the court to find that the latter is a cyber creation with the sole purpose of supporting the Plaintiff's fraudulent claim over the suit plot.

37. He submitted that the 1<sup>st</sup> Defendant did not tender evidence to support the Plaintiff's claim as it was the Plaintiff who availed at the hearing a register of members/shareholders of Mararui farmers Co. Ltd which was an old note book but on cross-examination, it came out that the said register had been tampered with and manipulated as the page the Plaintiff sought to rely on as showing that it's his name that is in the register is not of the same color, texture or age as the rest as it was evidently pasted and glued on where the original had been torn off.

38. He submitted that even in the altered version, the contents of the register do not logically support the Plaintiff's allegations since had the Plaintiff's allegation that he bought the suit plot from one Charles Nyambesa Ayora who was the original allottee been true, the register would read the name of Charles Nyambesa Ayora as the original allottee and that of the Plaintiff as the 1<sup>st</sup> or 2<sup>nd</sup> transferee but the register had the name of Sammy Njoroge Maina appearing under the second transfer column. He urged the court to find that the register is a document that was manipulated to defraud the 2<sup>nd</sup> Defendant of the suit plot.

39. He submitted that balloting was done way back in 1990. Survey was carried out in 1990, and allottees issued with allotment cards (referred to as yellow cards) in 1990 and the 2<sup>nd</sup> Defendant exhibited a ballot and yellow card dated 29<sup>th</sup> September 1990 in the name of John Thairu Ngugi who had paid Kshs.2500 for survey thus it would not be logical that the Plaintiff would be issued with a ballot card in his name in 1992.

40. He also submitted that the fact that the Plaintiff conceded that he had known the 2<sup>nd</sup> Defendant was in occupation of the suit plot yet took no steps to interfere with the occupation and development and instead sought by way of a demand letter dated 30<sup>th</sup> May 2002 to recover KShs. 400,000/= from Charles Nyambesa Ayora shows that he has no claim against the 2<sup>nd</sup> Defendant.

41. As regards the plaintiff's claim for compensation for the land at current rates, he submitted that the Plaintiff has not laid any basis for such a claim as against the 2<sup>nd</sup> Defendant.

42. He also submitted that the Plaintiff did not discharge the burden of proof required under **Section 107 of the Evidence Act**. He cited the court of Appeal case in **Mbuthia Macharia v Anna Mutua Ndwiga & Another (2017) & KLR** which reiterated the provisions of section 107 and 108 of the Evidence Act (Cap 80 Laws of Kenya) which deals with the subject of burden of proof in any case stating that it lies with the party who desires any court to give a judgement as to any legal right or liability to show the facts in which he alleges his case.

43. He further submitted that there is no evidence that the Plaintiff was ever allotted ownership of the disputed plot by the 1<sup>st</sup> Defendant He added that Plaintiff failed to prove existence of an allotment of ownership card also described as the yellow card as he casually said that he left it with a surveyor therefore there is no evidence that the Plaintiff was ever allotted ownership of the disputed plot. He urged the court to dismiss the Plaintiff's claim.

44. I have considered the pleadings and the evidence on record. I have considered the submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

*(i) Whether the Plaintiff is the rightful owner of the suit property.*

*(ii) Whether the 2<sup>nd</sup> Defendant's acquisition of the suit property was illegal and/or fraudulent.*

*(iii) Is the Plaintiff entitled to the reliefs sought?*

*(iv) Who should bear costs of this suit?*

45. It is the Plaintiff's case that he is the owner of the suit property. He told the court that he bought 75 shares from the original shareholder Charles Nyambesa Ayora for Kshs.39,000/-. The same were transferred to him on 18<sup>th</sup> October 1992 after paying Kshs.1000/- to the 1<sup>st</sup> Defendant. He was issued with a receipt No 184. He was then shown the beacons of the plot. He balloted for the plots and was issued with Plot No 338. He produced the original ballot as exhibit. The same was endorsed on the back by the District Officer Kasarani. He took possession of the plot.

46. He produced a transfer of share or stock dated 18<sup>th</sup> October 1992 as exhibit in this case. He also produced a letter dated 2<sup>nd</sup> June 2008 from M/S Harunani & Associates Licensed Land Surveyors, confirming that Plot No 338 Mararui registered as Nairobi/Block 139/723 shows the Plaintiff as the owner of the plot. This far the Plaintiff has been able to prove that he balloted for Plot NO 338 and was issued with yellow card No 751.

47. DW1 Mary Wangui Mburu a director of the 1<sup>st</sup> Defendant produced a copy of the Register showing that the owner of Plot No 338 is the Plaintiff. She produced the copy of the register as exhibit D1. She also confirmed that Plot No 0338 did not exist.

48. The 2<sup>nd</sup> Defendant on the other hand claims he bought Plot No 0338 from John Thairu Ngugi on 30<sup>th</sup> March 1993 for Kshs.2,500/-. It is his case that they proceeded to the 1<sup>st</sup> Defendant's offices in Hurlingham, where upon transfer his name was inserted in the official share register. DW1, has stated categorically that the 1<sup>st</sup> Defendant's offices have never been in Hurlingham.

49. I have looked at document Number 4 in the 2<sup>nd</sup> Defendant's list of documents. The same is allocation of plot to John Thairu Ngugi. The plot allocated is Plot NO 0338 and the same is dated 29<sup>th</sup> September 1990. The sale agreement dated 30<sup>th</sup> March 1993 between John Thairu Ngugi and Sammy Njoroge Maina now refers to Plot No 338. The consideration is Kshs.55,000/-. It is not indicated who drew the said agreement. The same is not witnessed by any body.

50. The transfer of share or stock dated 30<sup>th</sup> March 1993 also refers to Plot No 338 and not 0338 which John Thairu Ngugi was allegedly allocated. It therefore goes without saying that the 2<sup>nd</sup> Defendant is unable to explain how Plot NO 0338 became 338. The Plaintiff's story is more consistent. The Plaintiff has documents to support his claim.

51. The 2<sup>nd</sup> Defendant also produced a letter authored by D. N. Mwangi an accountant dated 8<sup>th</sup> July 1993 in which he confirms that Plot No 338 belongs to Sammy Njoroge Maina. It was DW1's case that only the Chairman can confirm ownership of the plots and not an accountant.

52. The 2<sup>nd</sup> Defendant also produced approvals from the then Nairobi City Council for construction on Plot 338. The same is however not signed but is dated 5<sup>th</sup> July 1993. The upshot of the matter is that the Plaintiff's documents are more authentic than the 2<sup>nd</sup> Defendant's. I find that the Plaintiff is the rightful owner of Plot No 338 now registered as Nairobi/Block 139/723.

53. The 2<sup>nd</sup> Defendant is unable to prove how he acquired registration of Nairobi/Block 139/723. This could have only been by illegal means. He is a trespasser on the suit property.

54. Having found that the Plaintiff is the rightful owner of the suit property, it follows that he is entitled to the reliefs sought.

55. It is in evidence that the 1<sup>st</sup> Defendant has always maintained that the suit property belongs to the Plaintiff. However, it was sued because it has not facilitated the Plaintiff to obtain a title deed. It will also bear costs of this suit.

56. The Plaintiff has produced a valuation report by M/s Horeria & Company Valuers dated 14<sup>th</sup> February 2011. The open market value of the plot excluding the improvements was given as Kshs.2,500,000 by then. No doubt land has appreciated in the said area. If the 2<sup>nd</sup> Defendant is to compensate the Plaintiff for the plot then another valuation ought to be undertaken to establish the current market value.

57. In conclusion, I find that the Plaintiff has proved his case against the Defendants on a balance of probabilities. The 2<sup>nd</sup> Defendant has failed to convince the court that Plot No 0338 is the same as Plot No 338. He also failed to prove the particulars of fraud attributed to the Plaintiff in paragraph 7 of his defence.

58. Accordingly, I enter judgment in favour of the Plaintiff as against the Defendants as follows:-

***(a) That an order is hereby issued directing the Defendants to execute the necessary transfer of the suit property being Nairobi/Block 129/723 to the Plaintiff within sixty (60) days from the date this Judgment. In default, the Deputy Registrar of this honourable court do sign the necessary documents to effect transfer in favour of the Plaintiff.***

***(b) That an order is hereby issued directing the Defendants to give vacant possession of Nairobi/Block 129/723 to the Plaintiff. Failure to which the Plaintiff do use lawful measures to evict the 2<sup>nd</sup> defendant.***

***(c) That the Plaintiff shall have costs of the suit and interest.***

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Gaita for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Mr. Oundu for the 2<sup>nd</sup> Defendant

Steve – Court Assistant.