



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 122 OF 2016**

**(Formerly NYERI HCC No. 44 of 2012)**

ESAU KARANJA NGUME .....1<sup>ST</sup> PLAINTIFF  
PETER NDIRITU MUKUNDI .....2<sup>ND</sup> PLAINTIFF  
RICHARD WACHIRA NUTHU .....3<sup>RD</sup> PLAINTIFF  
ANTHONY KING'ORI WANJORA .....4<sup>TH</sup> PLAINTIFF  
GEORGE MWANGI NYOGOTE ..... 5<sup>TH</sup> PLAINTIFF  
NANCY WAMBUI MUCHERU .....6<sup>TH</sup> PLAINTIFF  
GEOFFREY MACHARIA KIUGU.....7<sup>TH</sup> PLAINTIFF

**(T/A MUOTE ELITE ACADEMY)**

**VERSUS**

DAVID WAMBUGU KIBOI .....1<sup>ST</sup> DEFENDANT  
NELSON NGARI NJOMA .....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

**BACKGROUND**

1. This matter was initially instituted at the High Court at Nyeri being Nyeri HCCC No. 44 of 2012. It was transferred to this Court on 18<sup>th</sup> June, 2016 and given its current reference.

2. By their Complaint dated and filed on 22<sup>nd</sup> February 2012, the seven (7) Plaintiffs trading as Muote Elite Academy pray for orders against the two (2) Defendants for:

*(a) A declaration that the Defendants' registration as owners of (land) parcels Muhito/Gaturia/1518 and 1055 were fraudulent and unlawful and for an order rescinding the said registration and in its place the Plaintiffs and the Defendants names trading as Muote Elite Academy be noted in the register as the true owners of the land;*

*(b) A permanent injunction directed against the Defendants, their agents or anybody working under their instruction from alienating, wasting or undertaking any activity on the said (parcels of) land Muhito/Gaturia/1518 and 1055 without the authority of the persons trading as Muote Elite Academy;*

*(c) Kshs.800,000/- being the remainder (of the) purchase price (for) Motor Vehicle KBB 060A;*

*(d) An order directing the Defendants to hand over all the books of records to include the Muote Books of Muote Self Help*

*Group/Muote Elite Academy to the Plaintiffs herein; and*

*(f) Costs of the suit plus interest.*

3. The Prayers arise from the Plaintiffs position that together with the Defendants, they have since 1995 been members of Muote Self Help Group which Group has since transformed itself into a commercial unit in the name and style of Muote Elite Academy offering education under the Education Act. The Plaintiffs aver that the two Defendants were the founding officials of the Self-Help Group but were removed from office following election held on 16<sup>th</sup> September, 2011.

4. It is the Plaintiffs' case that the said Muote Elite Academy is built on five parcels of land being Nos. Muhito/Gaturia/1058; 1059, 1060; 1055 and 1518. They aver that they had entrusted the Defendants with ensuring purchase and transfers of the parcels of land into their names but contrary to the said arrangement they have since discovered that parcel numbers Muhito/Gaturia/1055 and 1518 are registered in the names of the Defendants.

5. The Plaintiffs aver that the two parcels of land contain various school structures built thereon for use by their school and that the registration of the Defendants, as the proprietors thereof was fraudulent and concealed from their membership. The Defendants have since dumped building materials on the two plots with a view to commencing construction.

6. It is further the Plaintiffs case that after they were removed from office, the Defendants have refused, failed and neglected to hand over all the books belonging to the group and have refused to attend the Group's meetings.

7. The plaintiffs further aver that in September 2011, the School sold its Motor Vehicle KBB 060A to the Defendants at an agreed price of Kshs.1,250,000/-. The Defendants have to-date only paid the sum of kshs.450,000/- and have refused and/or neglected to remit the balance of the purchase price being Kshs.800,000/-.

8. In their Joint Statement of Defence and Counter-claim dated and filed on 26<sup>th</sup> March 2012, David Wambugu Kiboi and Nelson Ngari Njoma (*the Defendants*) aver that they were not removed from office but relinquished their seats as Chairman and Secretary on the said 16<sup>th</sup> September, 2011.

9. It is the Defendants' case that the School is built on only three parcels of land being Muhito/Gaturia/1058, 1059 and 1060 but the construction on Muhito/Gaturia/1055 and 1518 belongs to the Defendants. The Defendants aver that they allowed the school to use part of their said land as they were part of the business but the two parcels and the developments thereon were never the property of the Group.

10. The Defendants deny that they failed to hand over to the Plaintiffs. On the contrary, they assert that they handed over the office with all books and that the institution is still running to-date. It is their case that they did put in construction material on the two parcels of land as they were entitled to develop the same just as they had been doing previously without let or hindrance.

11. By way of their Counter-claim, the Defendants aver that they had been partners with the Plaintiffs in running Muote Elite Academy and that they hold land parcels Muhito/Gaturia/1058, 1059 and 1060 as proprietors in common. It is their case that since leaving office, the Plaintiffs have been harassing them and are now by this suit claiming their two parcels of land.

12. Consequently, the Defendants aver that they have now lost confidence in the Plaintiffs and desire that the partnership be dissolved. Accordingly, the Defendants pray:

*(i) That (the) Plaintiffs' case be dismissed with costs;*

*(ii) The Counter-claim be allowed as prayed that the partnership be dissolved, accounts be taken and distribution be according to shareholding; and*

*(iii) Costs of the Counter-claim.*

### **THE PLAINTIFFS' CASE**

13. The Plaintiffs called two witnesses who testified in support of their case.

14. PW1 – Essau Karanja Ngumo is the 1<sup>st</sup> Plaintiff and a retired teacher residing in Othaya. He told the Court they initially formed Muote Self-Help Group to assist their members. They then started Muote Elite Academy which is a Primary School. PW1 told the Court he is the Group's Treasurer.

15. PW1 testified that the School sits on five plots being Muhito/Gaturia/1058, 1059, 1060, 1055 and 1518. While the first 3 plots are in their names, Plot Nos. 1055 and 1518 are in the names of the two Defendants. PW1 told the Court that until the year 2011, the 1<sup>st</sup> Defendant was the Group's Chairman.

16. PW1 further testified that after purchasing the initial 3 plots, they constructed the school but ran out of space after awhile. They then approached the original seller for more land and raised part of the money from the school and borrowed the balance of Kshs.300,000/- from the Defendants who had an organization called Ngwamuri.

17. PW1 told the Court the Defendants purchased, the additional two plots on the Group's behalf and that they later repaid the Defendants the sum of Kshs.3,472,670 and proceeded to construct on the extra plots. PW1 further testified that all the transactions of the monies paid by the Group are captured in their cash journals (Pexh 1). It was their practice that two officials would sign whenever money needed to be withdrawn.

18. PW1 further testified that the Defendants kept informing them that the two plots were in the name of the Group and that it was only in the year 2012 that they discovered that the Defendants intended to put up another school on the plots after they were removed from office. That is when the Group realized that the two plots were registered in the names of the Defendants.

19. PW1 told the Court there are classrooms, a watchman's shed and other structures on the two parcels of land. The Defendants had been the ones involved in the running the school and had erected the said structures on behalf of the Group.

20. PW1 further testified that they bought a school bus but decided to sell the same after incurring heavy losses. While the Defendants agreed to buy the bus at Kshs.1,200,000/- they had only paid Kshs.400,000/- leaving an outstanding balance of Kshs.800,000/-.

21. On cross-examination, PW1 told the Court they ran the Academy under the Business Names Act. He became a Treasurer of the Group in 2007. He conceded that he had not produced documents showing that the structures on the school were built by the School. It was further his case that the filing of the suit had not changed the relationship between the Plaintiffs and the Defendants. The Defendants had chosen of their own free will not to attend the Group's meetings.

22. PW2 – Peter Nderitu Mukundi is the 2<sup>nd</sup> Plaintiff and the current Chairman of the Group. He reiterated the averments made by PW1 as of the disputed properties.

23. On cross-examination, PW2 told the court that prior to the registration of the two parcels of land in the name of the Defendants, they were in the names of David Maina Ngethe. There was no sale agreement between the Group and the seller as the Defendants had been entrusted by the Group and empowered to enter into agreements on behalf of the Group. PW2 denied that the Defendants had used their money to purchase the two plots.

#### **THE DEFENCE CASE**

24. On their part, the Defendants equally called two witnesses in support of their case.

25. DW1 – David Wambugu Kiboi is the 1<sup>st</sup> Defendant. He told the Court they did together with the 2<sup>nd</sup> Defendant purchase land parcels Nos. 1518 and 1055 from their own sources. He further told the Court the two plots are separated from the 3 other plots belonging to the Group by a road. DW1 told the Court he did not append his signature to the accounts tabled by the Plaintiffs.

26. DW1 testified that no books of accounts were tabled at the meeting that removed him from the Chairmanship of the Group and that no handing over was done as everything else was in school while they met at a hotel. From the time he ceased being chair, he had never stepped into the school. He had also never been invited or participated in any meeting of the Group.

27. On cross-examination, DW1, told the Court he had been the Chairman of the Group from inception until his removal on 16<sup>th</sup> September, 2011. He confirmed that himself and the 2<sup>nd</sup> Defendant had been used by the Group to purchase plots of land on their behalf. As officials, they had signed the documents of transfer.

28. DW1 conceded that he had not pleaded that the accounts and balance sheet for the Group were doctored. He further conceded that the school sold him a bus and that he still owed the Group Kshs.800,000/- as the balance of the purchase price.

29. DW1 told the Court there were structures on the two disputed parcels of land and further that the school was using the same with their permission. They did not have an agreement with the school although they started using the structures when the Defendants were still in the office.

30. DW2 – Nelson Ngare Njoma is the 2<sup>nd</sup> Defendant herein. He reiterated the position taken by DW1 in regard to the acquisition and ownership of the two parcels of land in dispute.

31. On cross-examination, DW2 testified that he was not a founder member of the Group and was not there when the initial 3 plots were acquired. He told the Court Plot Nos. 1055 and 1518 were sold to him and the 1<sup>st</sup> Defendant by two different vendors. The total value of the Plots was about Kshs.800,000/-. He conceded he had not presented evidence of any account from where the money to purchase the land came from.

32. DW2 told the Court it is them as Defendants who had built the structures on the two plots. He conceded being a partner in Ngwamuri Agencies which supplied goods to the School. After they were removed from office, no handing over was done and the two have never been invited to any meeting of the Group. He further told the Court the Group constitution does not set out a mechanism for exiting the Group.

#### **ANALYSIS AND DETERMINATION**

33. I have taken a careful look at the pleadings as filed by the parties, the testimonies of the witnesses as well as the evidence tabled before the Court at the trial. Though granted an opportunity, none of the parties herein filed any closing submissions.

34. The Plaintiffs urge this Court to declare that the registration of the two Defendants as the proprietors of the parcels of land known as Muhito/Gaturia/1518 and 1055 were fraudulent and unlawful. They pray for an order rescinding the said registration and to have both their names and the names of the Defendants to be noted in the register under their business name of Muote Elite Academy as the true owners of the land.

35. The Plaintiffs also pray for a permanent injunction directed at the Defendants restraining them from alienating, wasting or undertaking any activity in the said parcels of land without the authority of the partnership. In addition they urge the Court to direct the Defendants to pay the sum of Kshs.800,000/- being the balance outstanding from the purchase of a bus belonging to the said Muote Elite Academy as well as an order directing the Defendants to hand over all books and records pertaining to the organization known as Muote Self Help Group and Muote Elite Academy.

36. From the material placed before the Court, it was not in dispute that both the 7 Plaintiffs and the 2 Defendants had in the year 1995 started an organization known as Muote Self Help Group. Overtime, the Group transformed itself into a commercial enterprise and started trading in the name and style of Muote Elite Academy. While the 1<sup>st</sup> Plaintiff told the Court the said Muote Elite Academy was registered as a business name, I was unable to find any evidence of such registration.

37. Be that as it may, it was evident that the parties acting as partners had managed to register a primary school under the said name fully accredited and authorised to offer education under the Education Act. Before wrangles erupted among the partners, the two Defendants herein were the Chairman and Secretary respectively of the Muote Elite Academy.

38. While the parties did not agree on whether the Defendants were forced out of office and/or if they relinquished their positions voluntarily, it was clear that the two Defendants ceased to be officials of the Self Help Group on 16<sup>th</sup> September, 2011, some five (5) months before the Plaintiffs instituted this suit against themselves.

39. According to the Plaintiffs, they had all along been aware that their school was built on some five different parcels of land. The Plaintiffs told the Court that they had initially acquired three parcels of land

being Muhito/Gaturia/1058, 1059 and 1060 and had carried out construction thereon. They however soon ran out of space and resolved to acquire two additional parcels of land. It is then that according to the Plaintiffs, they acquired land parcel Nos. Muhito/Gaturia/1055 and 1518.

40. The Plaintiffs told the Court that during those transactions for the purchase of the five (5) plots, the Defendants as their officials were charged with the duty of purchasing the same and having the land transferred into the names of all the members who were jointly trading as Muote Elite Academy.

41. It was the Plaintiffs' case that while all along the Defendants had led them to believe that the two titles had equally been transferred into their names, they were shocked to learn shortly thereafter that the two parcels of land were registered in the Defendants' names. It is their case that such registration could only have been procured through fraud and/or misrepresentation by the Defendants.

42. On their part, while they concede that they were officials of the Group and partners of the Plaintiffs, the Defendants assert that only the three initial parcels of land were purchased with the funds of,

and thus belonged to, the Group. It is however their case that they did purchase out of their own funds the two disputed parcels of land and that even though they allowed the joint business to operate therefrom, the structures on the land had solely been erected by themselves.

43. In support of their position that they had bought the two pieces of land, the Defendants produced two sale agreements in their names as purchasers and two different individuals as vendors. The Defendants accused the Plaintiffs of harassing them ever since they left office and by their Counter-claim, they urge this court to order accounts of the partnership to be taken and distributed and for the partnership to be dissolved.

44. I have looked at the two agreements pursuant to which the two disputed parcels of land were acquired. The first one for the purchase of LR No. Muhito/Gaturia/1518 is dated 6<sup>th</sup> January, 2005 and is executed between one Josphat D. Wandahi as the vendor and the two Defendants as the purchasers. It shows the sale price as Kshs.300,000/-.

45. The other agreement for the purchase of Parcel No. 1055 is dated 27<sup>th</sup> January, 2007 and is executed between one Ephraim Munga Gathaiya as vendor and the two Defendants herein as the purchasers. It gives the consideration also at Kshs.300,000/-.

46. There was no dispute that these two sales occurred at a time when the two were officials in charge of running the School on behalf of other partners. According to the Plaintiffs, the Group would never sign any sale agreements. It was instead the two officials who were entrusted with executing such documents and transferring the parcels to the names of the members of the Group.

47. Asked during cross-examination how the Group purchased the land, the 1<sup>st</sup> Defendant told the Court as follows:

“I was chairman of the Self Help Group from inception until I was voted out on 16<sup>th</sup> September, 2011. I confirm that I and the 2<sup>nd</sup> Defendant were used by the Group to purchase plots on their behalf. There were agreements for the first three plots which remained in the school after we were removed as office bearers. These plots were registered in all our names. The officials that time signed the transfer documents i.e myself as Chair, Mr. Wachira as Secretary and Mr. Wanjora as Treasurer.”

48. That being the case, it was clear to me that the *modus operandi* of the Group was to have the two Defendants purchase the land in their name and thereafter, they would transfer the same to the other members. There was no plausible explanation given by the Defendants why after purchasing the two properties in their names from their private income, they chose to include the same as part of the Muote Elite Academy without any arrangement or understanding with the other members of the Group.

49. Indeed I have perused the minutes of the meeting held on 16<sup>th</sup> September, 2011 when the Defendants were replaced as office holders. While the Defendants were present, there was no mention of any claim of the two parcels of land.

50. And while they denied using the school funds to acquire the land, a perusal of the cash journal prepared by the Defendants themselves for January 2008 reveals that on 20<sup>th</sup> January, 2007 under voucher No. 150, a sum of Kshs.300,000/- was paid under the narration shown simply as "Land". While the Plaintiffs held out that this was one of the payments made for parcel No. 1055, the Defendants who were the custodians of the records then did not offer any plausible explanation therefore save to deny that they had signed for the same.

51. Arising from the foregoing, I was left in no doubt that the two parcels of land and the classrooms erected thereon were the properties of the Group. As the Defendants conceded that no handover was done and that they still owe a sum of Kshs.800,000/- as the balance of the purchase price for the school bus, I was persuaded that the Plaintiffs had proved their case to the required standard.

52. While the Defendants sought to have the partnership dissolved, I was not persuaded that the grounds for dissolution of such partnership had been made out and or that this court was the right forum to do so.

53. In the premises, I find no basis for the Defendants' Counter-claim and I dismiss the same with costs.

54. Judgment is hereby entered for the Plaintiffs as prayed in their Plaint dated 22<sup>nd</sup> February, 2012 with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 17TH DAY OF MARCH, 2022.**

**IN THE PRESENCE OF:**

**MR. KARWERU FOR THE PLAINTIFFS**

**MS WAMBUI MWAI HOLDING BRIEF FOR S. K. NDIRANGU FOR THE DEFENDANTS**

**COURT ASSISTANT - KENDI**

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**J. O. OLOLA**

**JUDGE**