REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Suit 151 of 2004

FRANCIS SIRMA KIOS…….PLAINTIFF

VERSUS

KIBORE SIGILAI TELE…….DEFENDANT

JUDGMENT

THE PLEADINGS

In his plaint dated 6th May 2004 but filed on 21st May 2004, the plaintiff sought -

(a) a declaration that he is the rightful owner of the parcel of land known as WASEGES/NYAMATHI/BLOCK 4/57 OGILGEI and that the Defendant is a trespasser and is not entitled to enter, remain, in possession erect structures or in any other way use the said land AND UPON this declaration being made, an EVICTION ORDER do issue against the Defendant, its servants, agents and workers from the said parcel of land,

(b) Costs of this suit.

In his Statement of Defence dated and filed on 8th July 2004 the Defendant denied the plaintiff\'s claims and prayed for dismissal of the plaintiff\'s claim. The matter took time to conclude as the Plaintiff\'s father *(Kipkios Arap Sijo)* passed away and he had to obtain a Grant of Letters of Administration in respect of his father\'s estate before he was substituted as the Plaintiff. Upon substitution the Defendant sought and was also granted leave to file an amended defence which was duly filed on 6th April 2011, but is dated 5th April 2011. The Defendant introduced a counter-claim in the Amended Statement of Defence and also alleged fraud on the part of the plaintiff as well as particulars of fraud. As these claims are material to the ultimate determination of this suit it is necessary to set them out *in extenso*.

COUNTER CLAIM

"The Defendant *(hereinafter throughout referred to as the plaintiff)* reiterates all the foregoing and in addition avers:-

10. The Plaintiff avers that at all material times he, together with the Defendant\'s father were share holders of Ogilgei Farm Company Limited.

11. By virtue of his shares, the Plaintiff was entitled to be allocated and indeed was allocated with 10 acres of the said company\'s lands at Subukia.

12. In flagrant violation of the Plaintiff\'s right to quiet and peaceful possession of the said plot, and without any colour of right, title or interest and without the approval, permission or consent of the Plaintiff, the Defendant has taken or retained possession of part of plot No. 57 which he uses for cultivation though he resides on a 1 acre plot No. 146 - a public utility.

13. It is the Plaintiff\'s contention that possession is incidental to ownership and that he is entitled to the same and the Defendant\'s possession of a part of his said plot is an act of trespass and the Plaintiff prays for an order of eviction.

14. By some fraudulent trick the Defendant and/or his deceased father obtained title to the plaintiff\'s plot No. 57 and the plaintiff prays for an order of cancellation of the said title.

PARTICULARS OF FRAUD ON THE PART OF THE DEFENDANT AND/OR HIS DECEASED FATHER

(a) failing to join the Plaintiff to Nakuru RMCC No. 1039 of 1989 (Kipkios Arap Sio vs. Ogilgei Company Limited) when fully aware that the said plot had been allocated to the Plaintiff by way of ballot and that he was in possession of the same.

(b) deliberately failing to ballot.

(c) failing to take up plot No. 100 which was the only unballoted plot.

(d) procuring the registration of the said plot No. 100 in the name of the Plaintiff while fully aware that the said plot was left to the Defendant.

(e) coercing and intimidating the Company\'s officials into signing documents they were not other wise empowered to sign by the company in order to obtain registration.

(f) ignoring the company\'s resolutions to the effect that plot No. 57 was the property of the Plaintiff and not the Defendant.

(g) filing his claim in court which had no jurisdiction to deal with the claim.

(h) using an incompetent and unlawful decree to procure registration of the plaintiff\'s plot in his name.

15. There is no other suit pending and an earlier suit No. NAKURU CMCC NO. 271 of 2004 filed by the Defendant against the Plaintiff was withdrawn.

16. The said plot is situate in Subukia within the jurisdiction of this court.

REASONS WHEREFORE the Plaintiff prays for judgment against the Defendant for:

(a) a declaration that title No. WASEGES/NYAMAMITHI BLOCK 4/57 (OGILGEI) is the property of the plaintiff.

(b) the title No. WASEGES/NYAMITHI BLOCK 4/57 (OGILGEI) issued to the Defendant be cancelled."

In his Reply to Defendant\'s Amended Statement of Defence and Counterclaim, the Plaintiff admitted

Defendant\'s contention that he and the Defendant\'s father were shareholders of Ogilgei Farm Company Ltd, but denied the Defendant\'s all other claims put the Defendant to strict proof thereof and prayed for dismissal of the Defendant\'s counter-claim.

2. DISCOVERY

Before the commencement of the hearing counsel for the plaintiff and the Defendant completed discovery by exchange of documents. The Plaintiff filed a copy of the Title Deed purportedly issued to the Plaintiff on 8th August 1997 together with a copy of a Decree purportedly made and issued on 18th January 1991 in Nakuru C.M.C. Civil No. 1439 of 1991, in which the court purportedly ordered for amalgamation of Plot No. 57(Subukia Farm) with two acres occupied by the Posho Mill, and that the current allottee of Plot 57 be allocated another plot by the Defendant (OGILGEI FARM CO. LTD) together also with a Certificate of Confirmation of a Grant made to the plaintiff in Nakuru H.C. Succession Cause No. 66 of 2002.

The Defendant\'s list of documents was filed on 16th January 2012, and is dated the same date. It comprises of a -

(a) a copy of a list of members of Ogilgei Farm Subukia,

(b) a copy of the area map,

(c) a copy of the balloting paper.

Both the plaintiff and the Defendant gave evidence.

3. THE PLAINTIFF\'S EVIDENCE

The plaintiff\'s evidence was straightforward. The disputed land was allocated to his late father, KIPKIOS ARAP SIJO, deceased. He had taken out Letters of Administration in respect of his father\'s estate. The Grant was confirmed and the suit property was vested in him as sole beneficiary. The Defendant however occupied the land as from 1993, and that he is a trespasser and should be evicted from the suit land.

The Plaintiff testified that his later father complained against the company when the Defendant occupied the land, that he had sued the company in Nakuru C.M.C. No. 1039 of 1989 and obtained orders he sought, and the company was directed to find alternative land for the Defendant. In the event this did not happen, and the Defendant continues to occupy the suit land contrary to the said orders of court. He had also filed and on advice, withdrawn Nakuru CMCC No. 271 of 2004 for want of jurisdiction, and then filed this suit. The Plaintiff claimed that according to him, his father was the rightful owner of the land, and that the Defendant was a trespasser and should be evicted from the land, and directed to pay costs, and mesne profits for use of the land. He also claimed general damages.

When cross-examined by Miss Lagat for the Defendant the plaintiff denied that he had prevented his father from balloting. All he was aware is that his father as a shareholder was entitled to 10 acres of land and that every shareholder had to pay survey fees, and that his father had paid survey fees and obtained title to the land which was about 4 - 6 Ha and not $6^1/_2$ acres. He admitted that the land was Plot No. 57 on the map, and that the Posho Mill did not have a plot number, and that the area previously occupied by the Posho mill was not a dispensary.

When re-examined by Mr. Oumo, his counsel, the plaintiff reiterated his statement that since the company had accepted his claim to have the Defendant allocated another plot away from Plot 57, he had no more claim against the company. The plaintiff reiterated his evidence that it was only the Defendant preventing from obtaining title to his name as there were no other claims or encumbrances adverse to his claim.

4. THE DEFENDANT\'S EVIDENCE

Equally the Defendant\'s evidence was simple and candid. His father, like that of the Plaintiff were members or shareholders of Ogilgei Farm Subukia. Both had shares in the company. Each share entitled a member to 10 acres of land. The farm was distributed by way of balloting. The management would prepare and write on a small piece of paper *(the ballot paper)* on which would be written a number say from 1 - 500 *(depending upon the number of shareholders or members of the farm)*. The Defendant testified that on the day of balloting the Plaintiff advised his father not to ballot. The Defendant\'s father however took part in the balloting and picked Ballot Paper No. 57. Each Ballot paper represented a particular area on the farm map, according to the survey map prepared by the company\'s surveyors. This witness however acknowledged, when shown the register, that plot 57 had two names -

(1) Kibore Sigalei Arop Tele 10 acres,

(2) Kipkios Arap Sijo 10 acres.

The Defendant also testified that he did not understand why the plaintiff had come and hived off $6^1/_2$ acres of his father\'s Plot 57, leaving him with $3^1/_2$ acres. The Defendant contended that the plaintiff\'s claim is not tenable. The plaintiff had grabbed their land. There had been only one balloting and it was only the company which was allocating the land, and that it was the Chairman, of the Company who would explain what exactly happened, but on his part prayed the court to grant his counter-claim. Even after finding that the plaintiff had title, his father advised them never to surrender the plot to the plaintiff even as he grew old and lost his eye sight.

DW2 testified and corroborated the evidence DW1, as to balloting in order to acquire a plot. He remembered that the plaintiff\'s father refused to ballot, and instead came to court, and that the court gave the plaintiff\'s father Plot 57. He however testified that the Plot 57 was picked by the Defendant\'s father, his own father had picked plot 63.

In cross-examination, DW2 testified that he knew the plaintiff\'s father and that they live in plot 148 of Ogilgei farm, but that the plaintiff had cross-over and occupied 6.5 acres of plot 57, since 1993.

DW2 had a vivid memory. Plot 147 was a posho mill. It was not available for balloting. The company asked any member to purchase it for shs 20,000/=. The plaintiff did not buy, and that the plot 147 was sub-divided. He also remembered about a case against the company\'s directors, in which the court gave the shamba to the plaintiff. This witness emphasized that the Plot 57 belonged to the Defendant\'s father.

DW3 was Reuben Kibore Kole. He was the Chairman of Ogilgei Farm Co. Ltd from 1973 - 1987. The company, he testified, had three farms, Ogilgei (Subukia) Kuresoi and Njoro.

He described in detail, the procedure under which the three farms were sub-divided and given to each member of the company. Once his board had determined upon the sub-division of the farms, he called in the survey of Kenya, to prepare the sub-division map. Once this was ready, members were called to ballot and pick a number which represented a parcel of land of approximately ten acres.

This witness corroborated the evidence of both DW1 and DW2 that the plaintiff advised his father not to ballot, and it is the Defendant who balloted and got plot 57. He described the award of plot 57 to the plaintiff\'s father as *"the worst form of corruption"*. He only came to know that the plaintiff obtained title to the land at the hearing of the case.

DW3 also recalled there were $2^1/_2$ acres on which the plaintiff sought the company\'s permission to erect a posho mill, but when he was asked to pay shs 20,000/=, he declined. The plot was subsequently sub-divided and sold.

DW3 emphasised that without balloting a member could not get a shamba, that ***"the young man told his father not to ballot. It was a design to bring suits and disturb us."***

In cross-examination DW3 testified inter alia that Ogilgei Farm Co. Ltd. was dissolved in 1987 upon completion of distribution of the farms, and had therefore no Chairman. His Secretary was the father of the late Hon. Kones. He recalled that they went to the D.O.\'s Office, and informed the D.O. that the plaintiff\'s father refused to ballot.

DW3 also testified that there is an empty/fallow plot even today. He denied knowledge of the register produced with multiple entries in respect of several plots, including plot 57. He was aware of the Register in the custody of Mr. Kerong, the Treasurer. The register of members had only single entries, and was surrendered to the Lands Office through which titles were issued, that the Register submitted to the Lands Office should be in the record in that office. He expressed surprise that the title was given to the plaintiff. He was emphatic that the plaintiff\'s father declined to ballot, and he never told the D.O. that the Defendant would be given another parcel of land. This was the first time he heard of that claim.

DW3 emphasized, in re-examination that the Ballot paper had only a number without a signature and each member who balloted picked a number from a big envelope, and then ran to locate his plot on the grounds pegged.

That was the close of the evidence of the Defendant and his witnesses.

THE ISSUES AND ANALYSIS OF EVIDENCE

At the end of the hearing, respective counsel filed and exchanged written submissions. In his submissions, counsel for the plaintiff raised the following issues -

(1) whether the plaintiff\'s suit discloses a reasonable cause of action,

(2) whether the plaintiff\'s Title Deed was obtained lawfully,

(3) whether the Defendant\'s counter-claim is sustainable in view of its failure to enjoin either the company or the Land Registrar,

(4) whether the plaintiff is first registered owner of the suit land and if so the Defendant\'s counter-claim is sustainable in law vis-à-vis Chapter 300, Laws of Kenya,

(5) whether the plaintiff was fraudulent in his dealings regarding the land,

(6) whether the plaintiff misled anyone to cause himself to be issued with the Title Documents to the suit property,

(7) whether the plaintiff is entitled to the orders sought in the plaint,

(8) who should bear the costs of the suit.

I have considered the above issues in light of the evidence adduced above. In light of that evidence I would reduce those issues into two viz- whether the plaintiff has a lawfully issued title to the suit property and if so, is he entitled to the orders sought. The second issue is the reverse of the first issue, whether the Defendants counter-claim is tenable.

There is a common feature of which I take judicial notice, regarding land buying companies, and acquisition of individual parcels of land on farms collectively bought and settled upon by shareholders of the companies.

It is common among such land buying companies that once the purchase is completed from among the

sellers, the Management or Board of Directors, resolved that the farms be sub-divided and each member be allotted a parcel commensurate with his paid up shareholding. The management usually call in the aid of either the Government Surveyor *(through the Powerful Provincial Administration)* or through private registered land surveyors. These professionals then produce a sub-division map or drawing of the entire farm or land giving space for public utilities such as schools, dispensaries and markets. Once this exercise is complete, the Board invariably convenes an Extraordinary General Meeting at which the sole agenda is distribution of the farm, whether in accordance with the share certificate number *(where such certificates have been issued)* or by way of balloting as was done in the instant company of Ogilgei Farm Co. Ltd.

It was the evidence of the plaintiff (DW1), and DW3 the Chairman of the Company, that the distribution of the farm was by way of balloting. It was the evidence of DW1, DW2 and DW3, that the Defendant\'s father balloted and picked plot 57 from the big basket in which the Ballot Papers were put. It was also their evidence that the plaintiff advised his father not to ballot and the plaintiff\'s father never balloted, and could not therefore have picked ballot 57 which represented Plot 57. The evidence of DW3, the company\'s chairman showed that the balloting took place in 1987.

Further, a decree purportedly dated and issued on 18th March 1991, refers to ***"dismissal of an application to set aside the award of elders".*** The Plaintiff led no evidence as to what the **"elders award"** was, and who had made an application to which **"elders"** or **"tribunal"** and what the dispute was, and who testified before the **"elders"** and whether such elders had any jurisdiction or authority to hear and determine whatever the dispute was or indeed the dispute was over ownership of Plot 57.

It was the evidence of both DW1 and DW2 that the plaintiff invaded the Defendant\'s shamba Plot 57, in 1993, and occupied $6^1/_2$ acres thereof, that is, some six years after the balloting in 1987, and some two years after obtaining the decree of 15th January 1991 *(Nakuru RMCCC No. 1039 of 1989 -* ***Kipkios Arap Sijo vs. Ogilgel Farm Co. Ltd).***

The evidence of DW3 the Company\'s Chairman showed that the company was dissolved after the balloting in 1987. Besides para. 4 of the said decree said -

"that the current allottee of the Plot Number 57 be allotted to another plot by the Defendant."

DW3 the Chairman who appeared to be in his late 70s, was clear in his evidence that he does not remember any such suit or being served with by such papers. Besides, no court properly moved could determine a matter affecting the property of a party without first hearing such party. After balloting, which the Plaintiff expressly admits in paragraph 4 of the order above, the Plot no longer belonged to the company, but the allottee, that is, the Defendant. Besides, I doubt that the court of the Resident Magistrate 1991 had jurisdiction to determine a matter concerning a parcel of land of ten acres, whose value was most probably beyond the jurisdiction of such magistrate. And even if there was such jurisdiction, it would have been fraudulent for the plaintiff and the defendant in that suit to deprive the defendant of his plot without reference to him. It would also have been a breach of the rules of natural justice, all valid grounds for setting aside such orders.

All this leads me to say in conclusion that the plaintiff has not on the facts or established a case against the Defendant on the balance of probability. The plaintiff\'s counsel sought success in the provisions of Section 143 of the Registered Land Act *(Cap. 300, Laws of Kenya).* That Section says -

"143(1) Subject to sub-section (2) of this Section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made, or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or change for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or

default."

The question in this case is whether the plaintiff by asking his father not to ballot, and subsequently failing to obtain Plot 57 by the balloting process acquired title to the Plot 57 by fraud.

Under the provisions of Section 143 of the Registered Land Act, the Plaintiff\'s title to the suit land being a first registration can only be defeated on the grounds of fraud or mistake, or being a holder in possession of the land acquired for valuable consideration without fraud or mistake to which he did not substantially contribute by his act, neglect or default.

The Defendant\'s evidence and that of his witnesses DW2 and DW3, the Chairman of Ogilgei Farm Co. Ltd. was that the plaintiff prevailed upon his father not to ballot for the land. His eyes were set on Plot 57 and of which he could not be certain to obtain by way of balloting. He wanted to use other methods. It did not matter to him that the Defendants father balloted and picked Number 57 representing Plot 57 on the Survey plan, PExh. 2.

The Plaintiff had also no qualms having his father\'s name inserted in the Register of Members of Ogilgei Farm - DExh.2. I notice that other Plots such as plot Nos. 42 *(six members)*, 46 *(two members)* & 51 *(two members)*, 59 and 60 *(with two members each)*. The distinguishing features between these other plots with more than one member, is that members bear similar names, suggesting members of the same family. Plot 57 has the Defendant\'s and the Plaintiff\'s names, and it is clear even from the handwriting that the plaintiff\'s name was a late addition. Though both are written in capital letters, the plaintiff\'s name is clearly a late addition, and therefore an afterthought, and evidence of interference with the Register. DW3 who was the Chairman of the Farm Company was clear in his evidence that the plaintiff never balloted, and does not understand, and was unaware of how the court **gave** plot 57 to the plaintiff. In his words -

"Without balloting one could not get a shamba. The young man told his father not to ballot. It was a design to bring suits and disturb us."

That sentiment clearly demonstrates that though the Plaintiff\'s father got title to the Plot 57, neither the Plaintiff nor his father balloted for the land, and though entitled to some land of the company as shareholder, they were not entitled to Plot 57. The insertion of the name of the plaintiff\'s father **KIPKOS ARAP SIJO** in the register of members as being entitled to Plot 57, was certainly a mistake and outright fraud. It was a mistake because the plaintiffs\' father never balloted for Plot 57. It was fraudulent because there was no other basis for the entry of the plaintiff\'s name into Plot 57 in the Register of members. He had never balloted for it.

Lastly, the purported decree in Nakuru RMCC NO. 1039 of 1991, admits that the Plot 57 belonged to the Defendant, but that the company would find another plot for the defendant. There was no evidence of any consent by either the company or the Defendant to the said order. I have already observed that in relation to the Defendant that order was in breach of the rules of natural justice, and the court will not endorse such arbitrary and fraudulent decrees.

In so far as Section 143(2) of the Registered Land is concerned, this was a fraud actively promoted by the Plaintiff over a poor Defendant, and an abuse of the process of court. It was a fraud substantially contributed to by the plaintiff, and to allow him to retain title to Plot 57 or any part of it would be to perpetuate that fraud, and arrogance on the part of the Plaintiff.

To the issues raised by the plaintiff\'s counsel I would answer as follows-

(1) No doubt the Plaintiff\'s and the Defendant\'s respective father were original shareholders in OGILGEI FARM LTD, a land buying company,

(2) the addition of the plaintiff\'s father\'s name in the register was both a mistake and a fraudulent act by the plaintiff\'s father and his agents.

(3) the suit land belongs to the Defendant by virtue of the balloting card which clearly shows, number 57 in the register.

(4) what the Chairman disowned was the inclusion of two names in plot 57, and not the genuineness of the register.

(5) apart from the decree of 18th March 1991, there was no evidence of litigation and/or arbitration before the Directors of the company, the Provincial Administration nor any proceedings before the Resident Magistrate Court, at Nakuru.

(6) the Plaintiff\'s father was not duly issued with Title Number WASEGES/NYAMITHI BLOCK 4/57 OGILGEI, the Registered Land Act, (Cap. 300, Laws of Kenya),

(7) the occupation by the plaintiff of $6^1/_2$ acres of the suit land is an illegality.

Arising from the above conclusion, I must declare that the suit land belongs to the Defendant. The plaintiff\'s father who procured the registration of the suit land in his name did so through fraud. The plaintiff himself contributed substantially to the said fraud.

In the premises therefore I must in the exercise of the jurisdiction and the discretion conferred upon me by virtue of Section 143 of the Registered Land Act, cancel the registration of the plaintiff as owner of the suit land.

I also direct the Land Registrar, Nakuru to rectify the register by cancelling the name of the plaintiff\'s father, and substituting therefor the name of the Defendant KIBORE SIGALEI arap TELE forthwith.

In the event, the plaintiff\'s suit is dismissed with costs to the Defendant and the Defendant succeeds in his counter-claim. He shall therefore have the costs of the suit by the Plaintiff, and on his counter-claim against the Plaintiff in the main suit, and as Defendant in the counter-claim.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 18th day of May, 2012

M. J. ANYARA EMUKULE
JUDGE