



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

**Civil Case 120 of 2005**

**JOSPHAT GITHUNDI.....PLAINTIFF**

**VERSUS**

**KINGITHA MUNIU.....DEFENDANT**

**JUDGMENT**

In a Plaint dated and filed on 26<sup>th</sup> April 2005 JOSPHAT GITHUNDI (*the Plaintiff*) sued Kingitha Muniu (*the Defendant*) claiming that he, the plaintiff, was at all material time the legal owner of all those parcels of land now known and registered as Title Numbers LAGWENDA/NYAKIAMBI FARM COMPANY LTD and Title Number ELBURGON/ARIMI NDOSWA BLOCK 4/214 (NYAKIAMBI) in the Company's Farm "A" having been allocated the same by virtue of being a fully paid up share holder thereof.

The plaintiff also claimed that sometimes in the year 1980 the Defendant, a step brother to him requested the plaintiff to allow him to settle in the parcels of land aforesaid (*which I shall henceforth refer to as "the suit property"*) as a tenant for a period of 2 years pending the Defendant's finding an alternative parcel of land for resettlement. The Defendant however refused to vacate at the expiry of the 2 years and sometimes in 1982, or thereabouts the Defendant secretly and fraudulently transferred into and had the suit property registered in his own name.

The plaintiff gave particulars of fraud, and concluded that by virtue of such fraud, the Defendant held the suit property in trust for him and for his benefit. The plaintiff consequently prayed for -

(a) *a declaration that the Defendant holds the suit property in trust for him; (the plaintiff),*

(b) *an order directing the Defendant to transfer the suit property to the plaintiff within 7 days of service upon him of such order and failing which the Deputy Registrar of this court be authorized to execute the relevant transfer documents in favour of the plaintiff,*

(c) *costs of this suit and interest (on such costs),.*

**THE DEFENCE**

In an 8 paragraph statement of defence dated and filed on 7<sup>th</sup> June 2005, the Defendant denied all the

plaintiff's claims and put the plaintiff to strict proof of those claims. Specifically the Defendant -

(a) denied that the plaintiff was the legal owner of the suit property as it is the Defendant's father who transferred the suit property to the Defendant and also put the plaintiff to strict proof to the contrary,

(b) averred that the plaintiff's and defendant's father gave the plaintiff money to buy the suit property and after which each party was given his (own parcel of land),

(c) averred that the plaintiff had brought a similar suit in the lower court in the year 1989, and failed to prosecute the same because he knew he did not come to court with clean hands and the issue of jurisdiction did not arise then and only raised it when his suit was dismissed for want of prosecution in the presence of his Advocate.

The Defendant for those reasons prayed that the plaintiff's suit be dismissed with costs.

### **THE EVIDENCE**

Notwithstanding his averment in paragraph 4 of the plaint that the Defendant was his step-brother, the plaintiff in his evidence in-chief testified to the contrary, that in fact the Defendant was his "*blood-brother, one mother one father.*"

As it is often common in many of these cases concerning land acquired from land buying companies the plaintiff's evidence was that he was a bona fide paid up shareholder of Nyakiambi Farmers Co. Ltd which distributed the land to its shareholders. He himself had 8 shares which entitled him to 3 acres of land at Nyakiambi Farm, and another share of land at a place called Matunda.

The Plaintiff also testified that he was once a refugee in Tanzania, and that upon his return to Kenya, he bought shares in the company and then returned to Tanzania and that later the plaintiff asked him for permission to till the land, and that he allowed him to do so for 2 years on a brotherly understanding without any memorandum in writing. He saw no problem as the Defendant was his brother, and used to live in Naivasha. He demanded no rent from him as the shamba was bought in 1965, and the Defendant had entered the shamba in 1966.

The plaintiff also testified that when a family meeting was held in 1980's the suit land was his, and that when his father moved from Limuru-Kiambu to Naivasha he had nothing.

The plaintiff testified that he sent money to his father to pay for the survey, and stated that it is the same money his brother used to change the suit land to his own name. His complaint to the company elicited no reply, believing all the time that the Defendant would move out of the land, but refused.

The plaintiff completed his testimony by stating that the Defendant obtained the suit property by fraud, and that he did not need to sue the company - Nyakiambi Farm Ltd. as it was the Defendant, his brother, who caused the changes in the records of the company.

In cross-examination by Mr. Kahiga learned counsel for the Defendant, the plaintiff reiterated his testimony in chief, that he delayed in bringing the suit because of the Defendant's constant promises to move out of the suit property, and even after the family meeting in 1980 the Defendant refused to vacate the suit property. Even letters from his Advocate, Kamere & Co. Advocates did not evoke any movement from the Defendant.

The Plaintiff insisted that he bought the shambas, and that his brothers had none and reiterated that he sued the Defendant because of the changes he made in his title to the suit property.

With that evidence the plaintiff closed his case.

### **THE DEFENCE EVIDENCE**

The Defendant's evidence was a sharp contrast with that of the plaintiff. He confirmed that he lives in the suit property, and has done so since 1967, and that the suit land was allotted to him by his father who had bought it but found when he moved to the land that the shares were in his brother's – plaintiff's, name.

The Defendant testified that from inquiries made to his father, the suit property was acquired through subscription by his father, in the land buying company, called Nyakiambi Farmers Co. Ltd and that he had sent his brother the plaintiff, with shs 800/= to pay for the shares. The plaintiff had however entered his name in the Register, and not their father's name.

The Defendant testified that they (*the family*) was then living in Limuru and sold the Limuru Property, and moved to Naivasha but (the Defendant) was sent to go and plough the farm and live there. The plaintiff never visited the farm, and the issue only arose when he received a letter from the Plaintiff's Advocates demanding that he vacates the suit property.

Alarmed, the Defendant informed his father who in turn promised him that he would speak to the plaintiff but the plaintiff refused to heed his father's summons. He however replied to the Advocates Letter and denied the claims by his brother, and that thereafter he never received any other correspondence from the Plaintiff's Advocates.

The Defendant testified of his efforts to get the question of ownership of the suit land sorted out amicably. His father visited Nyakiambi Farmers Co. Ltd and spoke to the Chairman, that he, and not his son, the Plaintiff, was the beneficial owner of the suit property. The Chairman refused to listen to his father but directed them to go to the Chief of Elburgon Location who again summoned the plaintiff but the plaintiff refused to attend to the Chief. So the Chief Elburgon gave the Plaintiff and her father a letter to take to the Chief Naivasha who summoned the Defendant with the aid of an A.P. to attend to him. The plaintiff attended Naivasha Chief and promised to go to Elburgon but the plaintiff never did so.

Consequently, the Chief Elburgon asked them (he and father) to write down the circumstances under which the suit property was acquired. The family met comprising -

- (1) MUNIU NJUGUNA – Father
- (2) NJOKI MUNIU – Mother
- (3) NJENGA MUNIU – Brother
- (4) MUIRURI MUNIU – Brother
- (5) KANGETHE MUNIU – Brother
- (6) KIARIE MUNIU – Brother
- (7) NGENE MUNIU – Brother
- (8) KIGITHA MUNIU – Dependant

Only the Plaintiff Josphat Githundi was absent. The Defendant testified that the memorandum drawn on 16th January 1982, (Pext. 1), was drawn and signed or thumb-imprinted by all persons who attended the meeting, and was taken to Senior Chief Nathan N. Gerishon who on 23.01.1982 endorsed on it the words - "*The Chairman, please act accordingly.*"

The Defendant testified that he took the letter to the company, it canceled the name of the plaintiff in the Company's Register of Members and entered into it the Defendant's name and he then continued to pay and that he paid up to Ksh 1,200/= but all the shareholders paid shs 2,000/=. The Defendant produced receipts totalling some Ksh 1,200/= paid in the Defendant's name (*on 3.02.1971, 11.02.1975 and*

4.04.1978, for shs 200/=, shs 500/= and shs 500/=).

The Defendant also testified that since the Chief's letter, the Plaintiff has never visited the suit property, that he paid the survey fees and he received Titles to the respective parcels of the suit land from the Retired President H.E. D. T. Moi on 13.10.1988 and 21.08.1989 respectively or thereabouts, at Afraha Stadium Nakuru.

The Defendant also testified that after he obtained Title to the suit property, the plaintiff sued him in Nakuru CMCC No. 409 of 1989, and that when the Plaintiff failed to prosecute the case he applied for its dismissal for non-prosecution and that the suit was dismissed on 19.10.2005 and that by that time both of their parents were deceased and that the Defendant lived in Naivasha in one of the parents' plot although he has his own shamba – farm. The Defendant prayed that the plaintiff's suit be dismissed as the plaintiff knew how the suit property was acquired and came under the Defendant's name.

When cross-examined by Mr. Kahiga for the Plaintiff, the Defendant reiterated his evidence in-chief. He and the plaintiff are blood-brothers, one father and one mother. He has no personal differences with the plaintiff. They exchange greetings. They however differ over their conflicting claims to the suit land.

The Defendant recalled that the plaintiff lived in Tanzania before Independence, and when he returned, he was sent by their father to Elburgon where societies had been formed to buy and distribute land to their members. He had no idea about the authorship of a letter P.Exh. 4 as his father did not know how to read or write. The Defendant admitted that though his name was in the register, he did not have a share certificate, and even the receipts were issued in the plaintiff's name but he denied defrauding the plaintiff, his brother. He did not know whether there was any resolution by the company to issue title to him. All he remembers is that after members received titles, the company was dissolved, and the lower court case was dismissed for non-prosecution.

The Defendant also contended that if there was any problem, the plaintiff should have contacted the company, that the suit land was his. Their father was well and healthy when the family met and resolved that the suit property be allotted to him, and not the plaintiff.

DW2 was John Ngene Muniu (*Ngene*). He reiterated the plaintiff's evidence that he, the plaintiff and the Defendant are blood brothers. He also recalled the antecedents of the purchase of the suit land such as stated by the plaintiff. The initial seed money accumulated to shs 800/= was put up by their father who sold his small parcel of land in Limuru to come and purchase larger parcels at Kenton, Kijabe and Karati in Naivasha and then shares in Nyakiambi Farmers Co. Ltd.

Ngene also recalled that the plaintiff worked as a watchman in Tanzania and had left his wife under the care of her father-in-law, their father and that upon his return in the 1970's he settled one wife at Kenton in Kijabe, and another at Karati in Naivasha. The Plaintiff had however sold the land at Kenton-Kijabe and lived in Muniu Muiruri's parcel in Kijabe before settling down at Karati-Naivasha.

Ngene further testified that in the year 1982, their father (*who died in 1990*) had resolved a dispute as to who between them owned which parcel of land in Karati and that eventually his own dispute was resolved through the offices of the local District Officer who chaired the local Divisional Land Disputes Tribunal.

Ngene also testified that notwithstanding the disputes, he had compassion over his brother, the Plaintiff. He saw him very distraught in the streets of Nakuru, to the point where he could have been crushed by vehicular traffic. He called him and offered to transfer to him a portion of his own shamba.

Ngene also explained that the origin of the dispute between the plaintiff and the Defendant arose from the plaintiff's Advocates letter which led to their father summoning a family meeting which resolved that the suit property belonged to the Defendant and not the plaintiff, but that the Defendant never accepted the family decision, as he also declined to attend either the family meeting or the meetings

called by the Chiefs at Elburgon and Naivasha.

Ngene testified also that the plaintiff did indeed have his own money but that in this particular case their father had sold a piece of land at Githunguri to purchase a larger piece of land, and although he had disputes with his brother, he had no grudge against him, and that he had in fact accompanied the plaintiff to the funeral of the plaintiff's brother-in-law's funeral.

Ngene also confirmed that their father was not literate, and that it is he wrote and typed the Memorandum on the beneficial ownership of the suit land following the family meeting, and that the letter was endorsed by the Chief of Naivasha Location for adoption by the Chief of Elburgon Location and the Board of Nyakiambi Farmers Co. Ltd.

Hackman Muiruri Muniu (*Hackman*) was DW3. He too is a brother of both the plaintiff and the Defendant. The plaintiff is older than both the plaintiff and the Defendant, and also him, one Njenga being their eldest brother.

Hackman reiterated the evidence of both DW1 and DW2. He was present at the meeting in which the resolution was passed at the dictates of their father that the suit land beneficially belonged to the Defendant in this suit. He knew, he said, how the plaintiff got registered as a shareholder in Nyakiambi Farmers Co. Ltd. He remembers their father gave Joshat (*the Plaintiff*) about shs 3,000/= to look for a shamba among the land buying societies. Hackman also reiterated the evidence of DW1 and DW2, and indeed the plaintiff himself, that the plaintiff went to, and stayed in Tanzania for sometime; and upon his return he had allowed him to live in his shamba in Kenton although today, the Plaintiff has a house in both Mombasa and Naivasha.

Hackman was emphatic that the beneficial inheritor and owner of the suit land is the Kingitha Muniu, the Defendant. He has no grudge against Joshat the plaintiff.

Hackman was equally emphatic upon cross-examination the family meeting was held in Naivasha, the Plaintiff was informed and was aware of the meeting, he refused to attend. The meeting took place at their father's house. As family they wanted to agree on what was right. He (*the Plaintiff*) did not agree to the Transfer. He had been sent by their father to look for land, and had put his name in the Register of shareholders, instead of our father who had sent him.

## **ANALYSIS OF EVIDENCE AND THE ISSUES**

At the end of the evidence of the Defence, counsel for both the Plaintiff and the Defendant filed written submissions. I have perused both submissions in relation to the evidence by both parties as set out above. The plaintiff's counsel put the issues as follows -

- (1) *whether the plaintiff is the legal owner of the suit property;*
- (2) *whether the plaintiff allowed the Defendant to settle therein for two (2) years;*
- (3) *whether the Defendant refused to vacate the suit land upon expiry of the said tenancy period;*
- (4) *whether the Defendant fraudulently transferred the suit land and registered it in his name;*
- (5) *whether the Defendant comes to court with clean hands.*

For the Defendant the issues were put differently -

- (1) *whether the Defendant holds the suit property in trust for the plaintiff;*
- (2) *whether the plaintiff has proved fraud;*

(3) whether the plaintiff's claim is time-barred.

## **OF OWNERSHIP AND FRAUD**

As the question of ownership to the suit property and fraud are central to the plaintiff's claim, I shall deal with them first. In his submissions, the plaintiff's counsel dealt at length on incidents of ownership to prove that the plaintiff is the beneficial owner of the suit land. **Firstly**, the plaintiff held the share certificate in respect of the shares in Nyakiambi Farmers Co. Ltd. **Secondly**, the Plaintiff relied on the doctrine of equity, and **Thirdly**, that the Defendant held the land in trust for the Plaintiff, and if the court upheld those claims, then it should proceed under Section 143 of the Registered Land Act, (*Cap. 300, Laws of Kenya*) and order the rectification of the register by directing the registration of the Defendant be cancelled or amended on grounds of either fraud or mistake.

Taking each of the above issues, under the Companies Act, (*Cap. 486, Laws of Kenya*) a person may become a member of a company by either -

- (a) *subscribing to the Memorandum (of association of the company, (S. 28(1) of the Companies Act),*  
or
- (b) *agrees to be member by purchasing or taking shares in the company (S. 28(2) of the said Act).*

By being a member of the company, a person derives certain rights for instance the right to receive notices to attend annual or special/extraordinary meetings of the company. A member would not ordinarily be entitled, to other notices unless he is a member of the Management Board or Committee. There was no evidence that the Plaintiff was either a member of the Board or any Committee of the Company.

However, under Section 83 of the Companies Act, a certificate, under the common seal of the company, specifying any shares held by any member is prima facie evidence of the title of the member to the shares. The expression prima facie means evidence that will prove or establish a fact or sustain a claim or judgment unless contradictory evidence is produced - "*prima facie*" evidence is a rule which does not shut out evidence, but merely declares that certain conduct or document shall suffice as evidence until the opponent produces contrary evidence -

***"In its usual sense "prima facie evidence," is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges the onus" - R VS. JACOBSON AND LEVY [1931] APP. Cap. 466."***

Thus, as in this case, a share certificate is prima facie evidence of a member's title to the shares of a company. This evidence, as shown in the above listed citations can be displaced by contrary evidence.

Indeed in this case the plaintiff's membership and beneficial ownership of shares in Nyakiambi Farmers Co. Ltd was displaced by the clear evidence of the Defendant, and DW2 and DW3, who happen to be his own blood-brothers and were privy to the acquisition by the plaintiff of the shares in the company. Learned counsel for the plaintiff called in the aid of equity and fraud, and resulting trust in the ownership by the Defendant of the suit property.

Fraud at common law is intentional deceit, a false representation by the Defendant of an existing fact, made knowingly, or without belief in its truth, or recklessly, careless whether it is true or false, with the contention that the claimant should act on it, and which results in damage to the claimant – **REDGRAVE VS. HURD (1881) 2 Ch. D1**, Fraud unravels everything **MIDLAND BANK TRUST VS. GREEN [1981] AC 513**.

Again as clearly established by the defence evidence, there was no fraud at all. The Plaintiff was merely his father's agent, with his father's money, whether shs 800/= or Ksh 3,000/= was to purchase

shares in land buying companies or societies for the family. Being the man on the spot he acquired the shares in his own name. When the Defendant came on the scene with the express permission of their father to settle on the land, he paid for the shares, again in the name of the plaintiff's as clearly, he was first on the scene. The Defendant had been on shamba since 1966/7. The plaintiff appeared on the same in 1981, with purported to give a lease for 2 years to the Defendant, on the suit property. Under the Law of Contract Act, (*Cap. 23, Laws of Kenya*) contracts relating to land must be evidenced by some memorandum in writing. The Plaintiff had none, and such contract would have been clearly unenforceable.

According to Halsbury's Laws of England, 3rd Edn. Vol. 38, p. 861 para. 451, and cited by Potter J. in **ALLAN KIAMA VS. NDIA MATHUNYA & OTHERS**, (*Civil Appeal No. 42 of 1988*) -

***“A Resulting Trust is a trust arising by operation of law ... where property is purchased in the name or placed in the possession of a person without any intention that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended and is held to be equitable ...***

***And “equity protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice.”***

Taking the totality of the evidence, equity and the doctrine of the resulting trust, would have protected the Defendant, and the Defendant's family if the plaintiff had acquired title to suit property without reference to either the Defendant or other members of the family of MUNIU – MBARI WA MUNIU – as per D Eexh.I. In the result therefore I must answer all the issues raised by the Plaintiff in the negative. The Defence evidence negated all claims to membership and ownership of the share certificate in the Nyakiambi Farmers Co. Ltd. The plaintiff spawned all efforts by the family, and indeed the calls of Nyakiambi Farmers Co. Ltd to prove that he was the beneficial owner of the shares in the company, and therefore entitled to suit property. He failed to do so.

In the result, there is no basis of his claims against the Defendant. His suit against the Defendant is dismissed with costs.

**Dated, signed and delivered at Nakuru this 29<sup>th</sup> day of June, 2012**

**M. J. ANYARA EMUKULE**

**JUDGE**