



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Case 23 of 1995**

**STEPHEN NTONGAI M'MAILUTHA PLAINTIFF
VERSUS
M'MINYORI M'TWERANDU 1ST DEFENDANT
THE LAND ADJUDICATION &
SETTLEMENT OFFICER 2ND DEFENDANT
THE HON. ATTORNEY GENERAL 3RD DEFENDANT**

JUDGMENT

The plaintiff sued the defendants alleging that the 1st and 2nd defendants fraudulently altered objection proceedings number 150 to make it to relate to his parcel of land number 3066. As a consequence of that fraud, 5.90 acres was excised out of his parcel of land. He therefore pray for a declaration that he is the rightful owner of parcel number 306 Kianjai Land Adjudication Section measuring 22.75 acres. He also prayed for a declaration that the excise of 5.90 acres out of his land was null and void and seeks for its cancellation. The fraud alleged was denied by all the defendants in their defences. The plaintiff in evidence stated that parcel number 3066 was measured on 1st September 1967. It was also the subject of a hearing before Kinoru African Court being case Number 52 of 1965. He won that case and that land has been his since then. That the African Court visited the land and drew the map of his parcel of land. In that map, the first defendant's shamba is on the western side. Adjudication in that area started in 1967. He gathered his land and no one raised any claim to what he had gathered. His land was given parcel number 3066. Similarly, the 1st defendant gathered his parcel of land. Subsequently, the 1st defendant was a party in objection number 797 relating to parcel number 879. In that objection, the 1st defendant was awarded land by the committee. However, the outcome of that objection was implemented on the plaintiff's parcel number 3066. The plaintiff said that the objection number 797 was fraudulently altered to read objection number 150 and was made to show that it related to parcel number 3066. That the objection was between the 1st defendant and the plaintiff. The plaintiff stated that even the implementation of that objection was done secretly and without his knowledge. He said in evidence:-

“They are stealing my land.”

On being cross examined, the plaintiff said that his land measured 22.75 acres. He produced the objection proceedings and stated that the cancellations reflected from page 2 onwards were countersigned by the Land Adjudication Officer (L.A.O.) The plaintiff said

that he however was not present when those cancellations were done. That he became aware of the cancellations when he obtained the proceedings. He complained that those proceedings wrongly referred to his parcel number 3066. When he complained, he was advised to file the present suit but before filing this suit, he said that he had appealed to the minister of lands. PW2 was formally a member of Kianjai committee with the Ministry of Lands. He was one of the committee members that presided over objection number 150. However, in respect of its finding, he had this to say:-

**“That decision was fraudulent because they cut a
cut.
not been shown.”**

**shamba which we had not decided it be
cutting land where he had**

The 1st defendant stated that he was called Johanna M'Minyori alias Kiriamemba. He stated that when the land in their area was being measured, he left the plaintiff to represent him and requested him to have the measurement noted in a book he left in the possession of the plaintiff. When he returned, the plaintiff informed him that his measurements had not been reflected in that book. The plaintiff told him his land had been combined with that of the plaintiff because of a dispute that existed with a Matuu clan. The plaintiff told him that he had combined the 1st defendant's land in case there was need of taking the Meru traditional oath, Thenge oath. This, he said, would ensure that only one person would take the oath. The plaintiff however promised the 1st defendant that once the Thenge oath was finished, he would give the 1st defendant his land. According to the 1st defendant, that Thenge oath was not undertaken. The 1st defendant said that following the refusal of the plaintiff to give him his land he raised an objection before the L.A.O. and the matter was decided in his favour. The L.A.O. wrote a letter requesting for that decision to be implemented. That letter was dated 17th April 1996. It is in the following terms:-

“Ministry of Lands and Settlement

LA/TIG/6/VO. /7/290

**Land Adjudication Office
Tigania West Division**

P.O. Box 55

MAUA

TO WHOM IT MAY CONCERN

**RE: JOHANA M'MINYORI KIRIAMEMBA
P/N. 5409 KIANJAI ADJUDICATION SECTION**

**This is to confirm that Johana M'Minyori
5409 of 5.90 acres
demarcated on the ground and on the map.**

Kiriamemba has a land P/No

situated in Kianjai Adjudication Section. It is

This section is in A/R stage.

(G.H. NJIRI)

**FOR: LAND ADJUDICATION OFFICER
TIGANIA WEST DIVISION."**

He further stated in evidence that the plaintiff wrote letters complaining over that decision and its implementation. He exhibited those letters and it is essential to reproduce those letters in this judgment.

**"Stephen Ntongai Mailuthia
Kianjai Adjudication Unit
Tigania West
Urru Lands Office**

22/6/93

**The D.L. Adj. Officer
P.O. Meru**

Dear Sir,

**RE: OBJECTION NO. 150/92 MINYORI M'TUERANDU V/S
STEPHEN NTONGAI**

I humbly apply for the implementation of the above case in which I lost case to Mr. Minyori M'Tuerandu who was the complainant. I have been following this matter up to the time Mr. Mutiso left and the matter was not yet completed.

Today, 22nd June 1993, I left surveyors in my shamba with a policeman and the complainant. For this reason, I came straight to your office to seek your assistance for the following facts to be followed:-

- 1. The complainant claimed 5.0 acres from me as per his objection letter. Why to award him 5.9 acres from my land?**
- 2. The land that he showed to the committee to be plotted on the day of visit was at MBUGUTIA which is marshy place. Why to transfer land from where he showed to my shamba a good land, while my brothers who received land from me are still occupying land on the spot.**

NB: Let Mr. Minyori's shamba be implemented on the spot where he showed to the committee, so that one of my brothers moves next to me.

I don't dispute the judgment at this stage of the implementation.

Please sir, I apply for your urgent action.

Thank you.

Yours faithfully

M'Mailutha"

"22nd June 1993

Stephen Ntongai

Kianjai Adj. Unit
Tigania West
Urru - Meru Law Court
14th Dec. 1992

The District Land Adj. Officer
P.O. Box
Meru
Dear Sir,
RE: OBJECTION NO. 150/92

STEPHEN NTONGAI V/S MINYORI M'TUERANDU

The above case was heard by the arbitration committee on Thursday 26th November 92, and in the judgment, I lost the case to Mr. Minyori who was the complainant.

In my soba reasoning, I find a number of unfair points in the discussion of the committee. One of them is awarding five point nine (5.9 acres) from me alone when the land was shared between seven brothers who are my father's sons.

The serious mistake was caused by the surveyor who plotted the disputed land on 27/11/92. Now sir, the assistance that I request from you is the re-plotting by a different surveyor to clear my doubt. I reported my doubt immediately to the Urru Office.

I remain, looking forward for a positive reply.

Yours faithfully,

NYAMBENE"

The 1st defendant denied that there was any fraud relating to those proceedings. He also denied that when the committee visited the land they had visited the marshy area as claimed in the plaintiff's letter, defence exhibit number 3 reproduced above. The 1st defendant then said:-

"Mbututia is a swamp so no one could be given such land. No, I was not shown land in Mbututia."

The 1st defendant said that the L.A.O. carved out the land that had been awarded to him at Mailu. DW2 the Land Adjudication Officer produced the plaintiff's letters that are reproduced in this judgment which he said were in his possession. DW3 another adjudication officer produced the proceedings of objection number 150 the verdict and its implementation. He stated that following the implementation of that objection proceedings, the 1st defendant had been given 5.90 acres which was parcel number 5409. That implementation was reflected in the base map. That the base map also showed the plaintiff's parcel number 3066. According to this witness, there was no fraud in those proceedings. He said that the surveyor carried out the work of subdividing that land in the open. He however stated that he himself was not on the ground to know whether the plaintiff was present when those acres were carved

out. On being cross examined, he said that he did not know the person who was recording the proceedings of objection number 150. He could not tell why there were mistakes which necessitated cancellation. As stated before, the plaintiff in this claim has alleged that the defendants, more particularly the 1st and 2nd defendants committed act of fraud by altering objection number 797 which related to parcel number 879 to read objection number 150 relating to parcel number 3066. The plaintiff therefore seeks that the court will declare the subdivision of land as null and void. The plaintiff, although in the beginning of his evidence was not clear however when one considers his evidence in totality, and more particularly when he was cross-examined, his evidence supported his claim. PW2 was very clear in his evidence. He confirmed that he was a committee member and was one of those who presided over the objection number 150. He however said that the implementation was carried out on the wrong parcel of land and one which was not the subject of the objection proceedings. The defendant's case was that the plaintiff had agreed to have the 1st defendant's land measured but combined the 1st defendant's land with that of his. The 1st defendant said that it was as a result of that combination that he filed his objection number 150 which related to parcel number 3066. There are two issues that I see emerging out of this case. The first is whether the objection number 150 was fraudulently altered. The second is, if the answer to the first issue is in the affirmative, whether the plaintiff is entitled to orders as sought, that is, to have the 5.90 acres returned to his parcel number 3066. The first defendant submitted that the plaintiff did not prove fraud. Fraud is defined in the Black Law Dictionary as:-

“Knowing misrepresentation of the truth or concealment of a material fact.
.....”

The excising of the plaintiff's parcel number 3066 was based solely on what the L.A.O. entitled as objection number 150. Those objection proceedings I said were produced before court. On the first page of those proceedings, it shows that the objection is number 150 which relates to parcel number 3066. The parties are reflected as the 1st defendant who is the objector and the plaintiff in this suit who is the defendant in those proceedings. The plaintiff denies that the said objection related to parcel number 3066. Rather, he said that the objection between him and the 1st defendant was number 797 which related to the plaintiff's parcel number 879. Going through the proceedings of that objection, it is clear that at least on 6 separate pages there are cancellations. The 6 cancellations show that at least those 6 times the one recording the proceedings first indicated that the proceedings related to objection number 797 and to parcel number 879. On those 6 pages where it is reflected objection number 797 and parcel number 879, after they were cancelled, they were super imposed with objection number 150 and parcel number 3066. DW3, the L.A.O., on giving evidence was unable to explain why there were those cancellations. What is not clear is why a person recording proceedings would make an error on 6 separate pages necessitating their cancellations. One would accept that one or two mistakes would be made. But to have made a total of 6 mistakes only leads credence to the assertion by the plaintiff that there was fraud. DW3 as well as the other defendants and their witnesses were unable to rebut the plaintiff's assertion that the cancellations were a result of fraud perpetrated by the first defendant with the aid of someone within the land adjudication office. Page 11 of those proceedings is the finding of the committee and the L.A.O. That finding indicates that the committee and L.A.O. visited the subject land but the land that

they visited was not stated in the proceedings. Part of the finding is in the following terms:-

“FINDING

**Parcel where a shamba in dispute was visited on 27th November 1992
around 2.30 pm with both parties present with three quarters of land
committee members. Objector showed the shamba which he had send (sic) Stephen M’Ntongai the
defendant (plaintiff in this case) in this objection where (sic) gathering was supposed to
be done during gathering stage at Mailu area within Kianjai adjudication section.”**

There is no indication of what land was visited. However, at page 12 which is part of what is quoted above is again reflected the words, “Objection 797 parcel 879”. Those words were canceled then they were super imposed with the words, “Objection 150 parcel number 3066.” The defendants had a burden of proof to prove that the objection and even the finding related to parcel number 3066 and not parcel number 879. See Section 107 of the Evidence Act. I find that the plaintiff has proved on a balance of probability that the cancellation on those proceedings were done fraudulently. Even from the plaintiff’s letters that are reproduced in this judgment above, he consistently stated that the survey had wrongly been done on his parcel number 3066 which was not the subject of the objection between himself and the 1st defendant. The 1st defendant sought to rely on the plaintiff’s undated letter which is exhibit number 5 but I wholly agree with the submissions made by the plaintiff’s counsel that that letter is very vague since he does not specify how much land and from what parcel the plaintiff wanted to give the first defendant land. That letter is in the following terms:-

**“KIANJAI II
AMAKIA**

**The Land Adjudication Officer
Tigania Division
Miathene**

Dear Sir,

RE: GIVING A PORTION OF LAND

**I wish to give a piece of land to Mr. M’Minyori
portions measured at Mailu on 1/9/97.**

M’Tuerandu from one of my

MAITULA.”

The 1st defendant submitted that the plaintiff did not give notice prior to filing this suit to the 2nd and 3rd defendants as required under Section 13A of the Government Proceeding Act Cap 40. The 2nd and 3rd defendants did not in evidence deny receipt of that notice. Even in short defence filed on behalf of 2nd and 3rd defendants, there is no mention of lack of that notice. The 1st defendant’s submissions in respect of that notice therefore is misplaced. The 1st defendant further submitted that the consent obtained by the plaintiff from L.A.O. attached to his plaint in compliance to Section 30 of the Land Adjudication Act related to parcel number 3066 and not parcel number 5409 which is the parcel this action relates to. The consent attached to the plaintiff’s plaint is dated 9th August 1994. It states in that consent that the plaintiff was given that consent to file a case over parcel number 3066. However, DW3 in evidence the L.A.O. stated that the defendant’s exhibit number 7 reflected the implementation of the objection proceedings whereby

parcel number 5409 was carved out for the 1st defendant from the plaintiff's parcel number 3066. Defendant's exhibit number 7 shows that the implementation was on 3rd July 1999. It therefore follows that when the consent was given to the plaintiff on 9th August 1994 parcel number 5409 did not exist. The plaintiff's consent therefore cannot be faulted as the 1st defendant seeks to do. The 1st defendant further argued that the plaintiff should have first exhausted the mechanism of appeals provided under Sections 26 (1), 29 (1) and 34 of the Land Adjudication Act Cap 284. Those procedures of appeals relates to a situation where a party is dissatisfied with the committee's decision. The reading of those sections make that very clear. In making submissions that the plaintiff should have followed the procedure set out in the Land Adjudication Act of appeals, the 1st defendant sought to rely on the case Odhiambo Vs. Odenyo & Another [1973] E.A.

“The machinery provided by the Land Adjudication Act on a dispute had not been exhausted.”

However, the plaintiff as can be seen from his letter dated 22nd June 1993, defence exhibit number 3, he did not wish to challenge the decision of the committee. Rather, his complaint was that the committee's decision was being implemented on the wrong portion of land. It would therefore follow that the mechanism of appeals provided under the Land Adjudication Act did not apply to the plaintiff's case. The plaintiff's case is that the decision of the adjudication committee was fraudulently altered. In my view, the plaintiff was correct to have instituted this suit rather than to have followed the procedure of appeals as provided under the Land Adjudication Act. In this regard, I am well guided by the case Kahiga Kamua Vs. Lorien Ranching Company Limited & Others Civil Appeal No. 234 of 2003 where the Court of Appeal dealt with a case where the 1st respondent company alleged that in another suit before the High Court a consent had been fraudulently entered where a party fraudulently misrepresented himself as an official of that company. As a result of that consent, judgment had been entered and a decree had been issued. To challenge the fraud in that other case, the 1st respondent company filed another suit in the High Court alleging fraud in the other case and that second suit was met by an objection that the suit was *res judicata*. The objection was overruled by the High Court and the appellant filed an appeal against that dismissal. The Court of Appeal in part had this to say:-

“The consent order recorded in 80/83, in our view encompasses that definition. It is therefore amenable to the procedure available for challenging final judgments on allegations of fraud. Furthermore, the company pleads, subject to proof in the suit, that it was never a party in the earlier suits, hence the devastating effect of the orders obtained in those suits and the need to summon evidence in an independently instituted suit. We think the procedure adopted is also acceptable on this ground.”

In that case, the Court of Appeal quoted from various other decisions which are also useful to consider in this judgment.

“Jonesco V. Beared [1930] AC 219

“It is the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof.

Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted; the necessity for stating the particulars of the fraud and the burden of proof are in no way abated and all the strict rules of evidence apply."

The other decision was *Cole V. Langford* [1898] 2QB 36 where it was held that:-

"Where a judgment has been obtained by fraud, the court has jurisdiction in a subsequent action brought for that purpose, to set the judgment aside."

Cole V. Langford

Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents or of a machine, or of a process, had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or the other willfully and corruptly perjured."

Hip Foong Hong V. H. Neotia & Company [1918] AC 888 at pg. 894 when it stated:-

"A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail;where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient."

It therefore follows that the plaintiff was correct to have filed this case in this court as he did. The 1st defendant submitted that the correct procedure that ought to have been followed by the plaintiff other than appealing as provided under the Land Adjudication Act was to file a judicial review. Judicial Review relates to court's power to review the actions of other branches or level of government. See *Black's Law Dictionary*. Here, the plaintiff was not merely challenging the actions of the L.A.O. per se but rather he was alleging fraudulent alterations of the decision of the Land Adjudication Committee and the fraudulently implementation of the decision on a parcel of land that was not the subject of the land adjudication committee's decision. The plaintiff's claim therefore of fraud is outside the realm of judicial review. In the end, I find the plaintiff has proved that there was fraud in relation to the objection proceedings which led to the wrong excise of his parcel of land number 3066. The plaintiff is entitled to judgment as prayed. The judgment of this court is as follows:-

1. ***A declaration is made that the subdivision of parcel number 3066 Kianjai Land Adjudication Section of 5.90 acres resulting in parcel number 5409 was wrong and was null and void.***
2. ***An order is made canceling the subdivision of parcel number 3066 Kianjai Land Adjudication Section which resulted in parcel number 5409 and restoring the 5.90 acres to the plaintiff's parcel number 3066.***
3. ***The Land Adjudication Officer is hereby ordered to rectify the entries on parcel number 3066 Kianjai Land Adjudication Section to include the 5.90 acres represented by parcel number 5409.***
4. ***The plaintiff is awarded costs of this suit.***

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO
JUDGE