REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

CIVIL SUIT 28 OF 1998 (OS)

PETER KIMANI NJUGUNA ………..………..…….PLAINTIFF

-VERSUS-

PIUS KARURI KIGAMI …..………………….1ST DEFENDANT

KARURA FARMERS COMPANY LTD...…2ND DEFENDANT

JUDGMENT

A. CLAIM BY ORIGINATING SUMMONS

This suit was commenced by Originating Summons dated *26th October, 1998* and filed on *8th January, 1999*. The plaintiff, by his motion brought under Order XXXVI, rules 3 and 7 of the Civil Procedure Rules, sought orders as follows:

(a) that, he be declared the legal allottee and owner of plot No. 197 being part of L.R. No. 8479 which is a subdivision of L.R. No. 8469/4 situate within the City of Nairobi;

(b) that, the certificate held by 1st defendant if any in respect of the subject plot, be declared to be null and void for fraud and deceit;

(c) that, 1st defendant be declared a trespasser on the suit plot of land;

(d) that, 2nd defendant do cancel any other certificates it may have issued consequent to, against, over and above the plaintiff's certificate in respect of the subject plot of land;

(e) that, 2nd defendant be ordered to rectify its register, to reflect the plaintiff as the sole allottee of plot No. 197 aforesaid;

(f) that, the costs of the Originating Summons be borne by the defendants.

In support of the application, the following grounds are advanced:

(i) that, the plaintiff was allotted plot No. 197 in *1986* in his capacity as Member No. 126 in the 2nd defendant company;

(ii) that, 1st defendant has moved into the suit land and is attempting to develop the same,

claiming to have been allotted the same in *1994*;

(iii) that, the defendants are engaged in a scheme to defraud the plaintiff.

B. AFFIDAVIT EVIDENCE PROFFERED IN SUPPORT OF THE CLAIM

The plaintiff depones that he has been a fully paid-up member of the 2nd defendant-company since the early *1980's*, being Member No. 126 thereof. He produces membership-subscription slips, to prove he was a duly paid-up member of 2nd defendant.

The plaintiff depones that 2nd defendant was formed as a land-buying company for members, and, after it had received due payment of membership fees, it sub-divided its land, i.e. L.R. No. 8479 which had been sub-divided from a larger parcel, LR. No. 8469/4 within the Njiru/Kasarani area, into *plots*. Secret ballot was used to determine the specific plot to be taken by each member of 2nd defendant. As the plaintiff picked ballot No. *197*, he won the allotment of a particular plot, and he exhibits the ballot along with his share certificate No. 726, issued on *4th July 1986*. The plaintiff depones that sometime in *1997* he went to the plot allocated to him, and was surprised to find that an unknown person had laid construction material thereon. Upon inquiry, the plaintiff came to learn that ***Pius Kariuki Kigami*** (1st defendant) was the person who had deposited construction material on the suit plot and he was claiming to have purchased the said plot. In an exchange of correspondence between advocates, ***Pius Kariuki Kigami*** maintained he was now the owner of the suit land and he would construct a building thereon. The plaintiff averred that since he had won allocation of the suit plot in 1986, he had not sold it or transferred it, and he had not passed on possession to anyone. But 1st defendant was claiming to have purchased the suit plot from one ***Suleiman Gakuria,*** who was a total stranger to the plaintiff. Were it to be the case that the said ***Suleiman Gakuria*** also held a share certificate giving entitlement to the suit land, the plaintiff believed, then the same would have been issued in perpetration of fraud and deceit if it was not a forgery – and whichever the case, 2nd defendant would also have been complicit in the mischief. The plaintiff was calling upon 2nd defendant to clarify the allotment and ownership of the suit plot.

C. 1ST DEFENDANT'S REPLY

In 1st defendants replying affidavit filed on 11th May, 1999 he depones that he had made a sale agreement on *19th January, 1994* in respect of plot No. 197"B", the suit land, "with the then registered allottee ***Suleiman Gakuria***", and he had paid as consideration to the vendor the sum of Kshs. 65,000/; and the plot was thereafter transferred into his name with share certificate No. 959.

The 1st defendant avers that he learned from 2nd defendant's secretary that the plaintiff was indeed the original owner, but the suit land had been *repossessed* after the plaintiff failed to pay required additional capital; and that thereafter, the suit plot was allocated to ***Suleiman Gakuria Kuwehan*** on 20th March, 1990 at a consideration of Kshs. 23, 800/=, and the new owner then, on *19th January, 1994* transferred the plot to 1st defendant for a consideration of Kshs 65,000/-. It is further, deponed that 1st defendant as the new owner, then started the construction of a building on the suit plot. The 1st defendant depones that, between 19th January, 1994 and sometime in 1997, he enjoyed *quiet possession* of the suit premises; but then the plaintiff emerged with allegations that he (the plaintiff) was the true owner of the plot.

The 1st defendant depones that he is a *bona fide* purchaser for value, and any claim available to the plaintiff can only be as against 2nd defendant, for *refund* of the initial deposit of money.

D. 2ND DEFENDANT'S REPLY

The 2nd defendant's company secretary, ***Stanley M. Wandeto*** swore a replying affidavit in which he acknowledges that the plaintiff had "initially[been] issued with a share certificate No. 726 and allocated

plot number 197." The deponent however avers that the said allocation was conditional; it was "subject to payment of any additional share capital to the company." In 1989 the company had demanded from its shareholders (including the plaintiff) the payment of additional share capital, and several reminders were served upon members, but "the plaintiff failed, refused and/or neglected to pay up his additional share capital." The company then took the decision "to cancel the plaintiff's allocation and return his initial share capital." The 2nd defendant "advised the plaintiff of [its] intention to cancel the allocation and required him to return his share certificate for cancellation and to collect his initial share capital." The 2nd defendant proceeded thereafter to cancel the plaintiff's allocation, and "allocated the plot to ***Suleiman Gakuria Kuwehan***, on 20th March, 1990 for the consideration of Kshs. 23,800/- and issued him with share certificate No. 569." ***Suleiman Gakuria*** thereafter transferred his shareholding in 2nd defendant company *and the accompanying plot* to ***Pius Karuri Kigami*** (1st defendant), on 19th January, 1994, with *2nd defendant's consent*. The 2nd defendant then "proceeded to register the said ***Pius Karuri Kigami*** as the allottee of plot No. 197 and issued him with a share certificate number 959 on 25th January, 1994."

The deponent deponed that the plaintiff has refused to return the original share certificate given to him for cancellation, and he has refused the invitation that he collect his initial share capital of Kshs. 6,700/-. It is deponed that the 2nd defendant remains "ready and willing to refund" the plaintiff's initial share capital, on return of the initial share certificate for cancellation.

E. ISSUES FOR RESOLUTION BY TRIAL

Counsel on both sides identified the trial issues, and filed the same on 12th July, 2002. These are as follows:

(a) Who is the legal owner of plot No. 197, also known as Nairobi/Block 141/297?

(b) Is 1st defendant's letter of allotment and certificate of lease in respect of plot No. 197 valid?

(c) Is 1st defendant lawfully in possession of the parcel of land, or is he a trespasser?

(d) Was the second allocation of the said parcel of land to 1st defendant by 2nd defendant lawful?

(e) Did 2nd defendant act lawfully in issuing another allocation of the parcel of land to 1st defendant?

(f) Is the plaintiff entitled to the prayers sought?

(g) What order if any should be made with regard to costs?

F. EVIDENCE ADDUCED FOR THE PLAINTIFF

The plaintiff, ***Peter Kimani Njuguna*** (PW1) gave evidence that he was a member of a land-buying company, the second defendant, which owned land in the Kasarani-Mwiki area of Nairobi. He bought shares in the company, and his first payment receipt was issued on *24th July, 1980*. The plaintiff later made further payments, in respect of survey and registration, and on *26th January, 1983* he paid an additional share-subscription, in the sum of Kshs. 4470/-. Thereafter, plots on the 2nd defendant's parcel of land were taken by members, through balloting; in PW1's words: "All members were present and took ballots. The ballot you took gave you your plot number"; and his ballot was No. 197, and so he got plot No. 197 which he did inspect; and *share certificates* were then issued to members, including the plaintiff.

It was the plaintiff's testimony that the process of plot acquisition was complete, when he got his share certificate; in his words: "*Thereafter I knew the plot was mine; and so I returned home satisfied.*" But one day he sent his son to the suit plot only to return with information that some unknown person had

already put up a building on that plot, and was *actively digging trenches* thereon.

It was the plaintiff's testimony that since the time he had been given his "final certificate", nobody had ever written to him demanding further share-capital payments; and he "never sold his plot to ***Pius Karuri Kigami***." It was PW1's testimony that: "When we got the last certificate, we were told there was no further payment"; and the certificate he got bore his personal address: P.O. Box 435, Kikuyu. PW1 said that since he got his last share certificate no letter had ever been posted to his address calling for further payment from him; he has never heard that any further payment was required; and he has never received word that his certificate was at risk of being cancelled; for "*the moneys we paid were the value attached to the plot.*" So the plaintiff was asking the Court to restore his land to him, with costs of the suit.

On cross-examination, PW1 acknowledged that the share certificates he had for the land, specified that he was *subject to the rules of the 2nd defendant-company*; and so, had the company demanded further subscriptions for the shares, he would have paid up. But his understanding of his position on the suit land was thus expressed: "*I knew the plot was mine, once I got the certificate; so I went home. I never resigned as a member. I continued to be a plot owner and a shareholder. After I got the certificate, I went to the Rift Valley, and stayed there. I did not write to say I had now moved from Kikuyu to the Rift Valley.*" He *did not know* when the 1st defendant entered the suit land and began construction there.

The plaintiff was able to witness for himself, in Court, the sale agreement between 1st defendant and one ***Suleiman Gakuria***, and the receipt for the transfer fees between the two. He similarly witnessed that a share certificate, relating to the same plot No. 197 which he regarded as his, had been given out to a different person on *25th January, 1994*. He thought this to have no materiality just because, in his words: "*my document had been given by the company; I did not know that the title could change later, with official sanction.*"

The plaintiff assumed that once he won the suit plot though balloting he had *nothing more* to do with the land-buying company; and he knew not whether 2nd defendant was a company-in-debt. In PW1's words:

" I did not know that Karura Farmers' Company was indebted. I did not know if it was indebted to Mukinye Enterprises. I did not know Mukinye Enterprises was going to auction the plots."

The plaintiff said he *did not know* that members of the defendant company had met and decided that additional share capital be paid by the shareholders. And he *did not know* that the members had agreed that the plots of those who failed to pay the additional capital, be sold off. Although the members' said the resolution had been published in the *Daily Nation* of 16th August, 1989, the plaintiff did not know of it; and he still did not get to know, even though the same resolution was published for the second time in the *Daily Nation* of 3rd August, 1990. The resolution was published for the third time in the *Daily Nation* of 20th April, 1990; but still, the plaintiff said he knew not, of it. The same resolution was also published in the mass-circulation Kiswahili newspaper, *Taifa Leo*, on 28th April, 1989 and on 29th May, 1989, but the plaintiff did not come to know of it. Although the plaintiff said he regularly listened to KBC radio, he did not know that the said 2nd defendant's members' resolution was announced on that radio on *27th April, 1989* and on *29th April, 1989*; he said: "I never heard."

So the plaintiff did not pay-up any additional capital, and of this fact, he thus said in cross-examination:

"*I never paid any additional capital. I paid only the original capital. I had paid with finality. I had paid in 1980. The plot is mine. I did not have to pay again. The 1st defendant took my plot, but I never gave it to him. Even the vendor to him did wrong.*"

The plaintiff testified in cross-examination that he "did not know the 1st defendant," nor did he know if that defendant had built on the suit land. But he later said, in contradiction, that the said 1st defendant *had put up a stone house* on the suit land.

During re-examination, the plaintiff said the various media notices regarding payment of additional capital by members of 2nd defendant-company had not reached him: because "*nobody told me announcements would be placed on the media.*" Of his Post Office Box at Kikuyu, and mail being sent to him there, he said if any item went to that address he would receive it, for he had two homes, one at Kikuyu, the other at Nyahururu in the Rift Valley.

The plaintiff, in effect, was *renouncing any association with 2nd defendant company*; in his words: "The moment I took the ballot, I had nothing to do with the company. The land was mine. I did not expect anyone to trespass on my land or claim title to it. The plot could not have been transferred without my original certificate."

G. THE DEFENDANT'S CASE

Learned counsel ***Mr. Kibatia***, before calling his three defence witnesses, opened the defence case as follows. The plaintiff as a member of 2nd defendant company, was duty-bound to comply with the provision of the memorandum and articles of association of the company; and part of the requirements under those constitutive documents was, compliance with *calls for further payment on the issued share-capital*. The company also had the powers to *take over* any shares not fully paid-up; the company had a *lien* over all issued shares. At a special general meeting attended by shareholders, the members had agreed on *additional share-capital* to be paid by all shareholders on or before *6th September, 1989*. The defendants would show that the plaintiff had blatantly refused to pay additional share-capital; and so the 2nd defendant *repossessed* and *sold* the plot which had been allocated to him, to one ***Suleiman Gakuria*** who, in turn, sold it to 1st defendant. It would be shown that 1st defendant was a *bona fide* purchase for value, and he had been duly issued with a *share certificate* by 2nd defendant; 1st defendant was then issued with an *allotment letter*, and a *certificate of lease* from the Lands Office of the Government of Kenya. With these transactions by the Lands Office, the original plot No. 197 which the plaintiff was claiming, had ceased to exist, and is now represented by *L.R. No. Nairobi/ Block 141/297* which is the property of *1st defendant.*

H. DEFENCE TESTIMONIES

The defendant, ***Pius Kariuki Kigami*** testified as DW1, and said he is the owner of L.R. No. Nairobi/block 141/297 which used to be plot 197B at Kasarani – Mwiki; he purchased it from one ***Suleiman Gakuria*** in 1994, and he has constructed his home on the said land. He had purchased the suit land under a *written agreement*, and paid the sum of Kshs. 65,000/- as *consideration*. The purchase transaction had been approved and witnessed by the chairman of the 2nd defendant-company, and thereafter 1st defendant had taken *possession* immediately. It is the 1st defendant who paid the survey fees for the suit land, and a receipt for that payment of Kshs. 2,000/- to the 2nd defendant was issued (receipt No. 136, dated 19th January, 1994); and on 31st August, 2008 he was given the Ministry of Lands and Settlement *allotment* for the suit land. This was followed with a document of lease from the Lands Office to 1st defendant, dated 20th November, 2000; he signed it and duly returned it, and thereafter, on *24th November, 2000* he was issued with the *title deed*. The 1st defendant considers he has the full colour of right to the suit land, and it is precisely on that footing that he has, as at the time of this trial, "built a stone-house with three bedrooms, and [installed on the plot service facilities such as] running water, electric power, toilets and bathrooms"; he has fenced the suit land; and he lives thereon with his family, that is, his wife and four children.

The 1st defendant testified that the instant suit was filed in *1998*, some *four years* after he purchased the suit land, and during that span of time he had not heard of any dispute regarding the ownership of his land.

Upon cross-examination by learned counsel ***Mr. Namada***, 1st defendant gave further testimony as follows. When he purchased the suit land from ***Suleiman Gakuria***, it had been a good-faith transaction in which the vendor showed his documents of claim to the land, and willingly accompanied him to the

offices of 2nd defendant where it was *confirmed* that the true owner of the said plot of land was *the vendor*. On that occasion, the 1st defendant met both the chairman and secretary of 2nd defendant, and he was shown the minutes of the company showing that ***Suleiman Gakuria*** had become the owner of the suit land; and 1st defendant was shown Minute 689 in 2nd defendant's minutes of the Special General Meeting of *10th June, 1989*: that minute stated that the company would repossess plots belonging to those members who were not paid-up on their shares.

In 1998, 1st defendant received a letter, dated *16th March, 1998* posted to his regular address, alleging that he had trespassed on someone else's land. Being concerned, 1st defendant visited 2nd defendant's offices, where his information and belief was confirmed: ***Suleiman Gakuria*** had been an honest vendor, and he, the 1st defendant, had properly acquired the suit land; nobody mentioned the name of the plaintiff herein, as an owner of the suit land. The 1st defendant only came to know of the plaintiff herein when the suit was lodged; and he saw no need to bring in ***Suleiman Gakuria*** in third-party suit, because it was evident to him that ***Gakuria*** had been the true owner before him. The 1st defendant completed his constructions and settled on the suit land *one year* before suit papers were served upon him. By that time, 1st defendant had already expended Kshs. 270,000/- in putting up his residence on the suit land, and incurred further expenses on fencing, lighting, conservancy and services. Although 1st defendant obtained title documents for the suit land during the pendency of suit, he said he had restricted himself to official arrangements, in securing the same; and he did not at the time mention that there was a new claim on his property, as he believed the sale-and-purchase transaction had been lawfully conducted.

Suleiman Kuwehan Gakuria(DW2) was called as the defendants' second witness, and he explained how he had sought land from 2nd defendant and had purchased *shares which entitled him to the suit land*, having paid Kshs. 23,800/- to 2nd defendant. After he purchased the plot, DW2 became more affluent, and saw no need to develop the suit land as it was not suitable. ***Suleiman Gakuria*** asked the management of 2nd defendant to find him a purchaser and, in 1994, 1st defendant herein was introduced to him, and he(DW2) sold the land to him for Kshs. 65,000/-. A transfer form was issued to DW2 by 2nd defendant, and it is on this basis that the suit land was transferred to 1st defendant herein. An agreement was entered into on *19th January, 1994*, duly signed, and DW2 returned his share certificates back to the chairman of 2nd defendant-company. From 1990 to 1994, DW2 held the suit plot, and *no competing interest* ever arose, from the plaintiff or anyone else; and since 1994 and to-date, nobody has approached DW2 to complain that there had been anything wrong about the sale-and-purchase transaction of 1990.

On cross-examination by learned counsel, ***Mr. Namada***, DW2 showed the receipt issued to him by 2nd defendant in respect of the suit land, in 1990. The witness said he had made *payment to the company*, and he had been issued with a *share certificate*, and conducted around the suit land itself.

Responding to questions by the Court, DW2 clarified that the owner of the property he was purchasing was the second defendant, and in all the transactions involved, meetings were held in 2nd defendant's Chairman's office, in the Kasarani-Njiru area.

The defendants' last witness, ***Tom Ouko Apamo*** (DW3) testified that he was Secretary & Director of Karura Farmers Co. Ltd (2nd defendant). He was elected a director in 2000, and had custody of the company's records and documents.

DW3 had custody of the original record with names of members who acquired plots in the period 1980-1989. The company was established in 1980, and those desirous of becoming members, registered up to 1985. It was realized in 1985, that only some of the members had competed payments for their share allocations; and the decision was taken to allow them up to 1988/89 to complete.

DW3 testified on the antecedents of 2nd defendant-company: its land had at first been owned by a company known as Mukinye Enterprises, and when 2nd defendant acquired the land, it was to make

payment to Mukinye Enterprises, and by 1989 it owed to Mukinye Enterprises Kshs. 1.1 million, with an interest-sum of Kshs. 1.3 million. So in March 1989 the 2nd defendant called a Special General Meeting, held at the District Officer's office Kasarani, and resolved that every member was to make an *additional payment* on *share-subscriptions* of Kshs. 2,454/-; and those members who defaulted in making the additional payment would forfeit their plot-allocations; and such plots would be sold to new members within a period of eight months. Communication on this matter, between the company and its members, was effected through the media (newspapers, and radio announcements), and by sending mail to members' known addresses. Those who duly paid up the additional amount were issued with receipts, and their names were entered in one of the record books.

DW3 testified that membership of the 2nd defendant-company could only be attained by *buying a share*; and a person who did not complete payment for the share could *lose membership*; and by *buying a share*, one was by that very fact, buying a particular *plot of land*. It was known to the directors that the company had *960 plots*, and the numbering of shares reflected that arithmetic. Once a person became a member *by buying a share*, he or she would be waiting for the day of balloting, for the available plots.

It was DW3's testimony that the 2nd defendant's Special General Meeting Resolutions which resolved to declare forfeit the land-allocations of members who did not complete payment of share-subscriptions, were published widely, so as to reach all members: in *Taifa Leo* of 28th April, 1989, at page 11; *Taifa Leo* of 29th May, 1989; *Daily Nation* of 20th April 1990; *Daily Nation* of 3rd August, 1990. In addition, casual announcements of the matter were made on Voice of Kenya, Gikuyu Language, on 27th April 1989; and on Voice of Kenya in Kiswahili.

Members of 2nd defendant-company who failed to make the required additional share-payment were invited to come and *collect their original subscriptions*; and some indeed came, returned their share certificates, and collected their monies. An example was given of one ***Susan Njeri*** who received banker's cheque No. 012000 for Kshs. 5,000/-, as refund for her plot which was *repossessed* by 2nd defendant; and she duly signed for it, and indicated that she had no further claim against the company. There were *31 members* to whom such refunds were made, and their allocated plots were repossessed, for failing to make payments on the additional share-call. Apart from the media communication, 2nd defendant sent letters to defaulting members individually, to come and collect their funds, when allocated plots were being repossessed.

Letters sent out to defaulting members would be *registered*; and there were cases in which members had changed their addresses, and so the Post-Office returned the letters which had been addressed to them. There was no evidence that mail addressed to the plaintiff at his address, P.O. Box 435, Kikuyu had been returned.

I. URGING THE PLAINTIFF'S CASE: COUNSEL'S SUBMISSIONS

Mr. Namada underlined the significance of the fact that the plaintiff, at a shareholders' balloting forum, had picked up the token that gave him plot No. 197; and the fact that, thereafter, the plaintiff was given by 2nd defendant-company a share certificate which read:

"Member No. 126, PETER KIMANI NJUGUNA of P.O. Box 435 KIKUYU has been legally allocated Plot No. 197……"

With the said certificate, counsel submitted, "the plaintiff went home with his certificate having lawfully acquired the said property." From the moment of issuance of the said certificate, ***Mr. Namada*** contended, "the company had lost all rights and interest in the said property; the property was [the] free property of the plaintiff, liable to his own decisions, whether to sell, transfer, or pledge."

In his submissions learned counsel invoked yet another clause in the terms attached to the share certificate granted to the plaintiff, even though, to my mind, the said clause does not at all appear unequivocal:

"*No transfer of the above plot can be registered unless accompanied by this certificate.*"

From that ambivalent term, learned counsel urged as the intent, the proposition that "the plaintiff could on his own free will, sell off and transfer the property to anybody else …, at a monetary consideration." Counsel urged that "a company cannot pass a resolution to attach free property not belonging to itself without the consent of the property-owner sought and obtained."

Learned counsel contended that there was no instrument to convey title to the suit property to 1st defendant, and so the suit land remained the property of the plaintiff herein.

Mr. Namada urged the principle of *nemo dat quod no habet*: "having allotted the share to a member after full payment, did the company retain any right in the said share which they could transfer to somebody else…..?" He contended that the 2nd defendant was left with no share over the suit land to transfer to the 1st defendant.

J. THE LAW IS NOT IN YOUR FAVOUR: SUBMISSIONS FOR THE DEFENDANT

(a) Is ownership of the Suit Land Linked to Share-holding in 2nd Defendant-Company?

Learned counsel, ***Mr. Kibatia*** submitted that there was an unseverable link between ownership of the suit land, and being the holder of shares in the company; and consequently, the plaintiff's ownership was premised on his ability to "continue obeying the rules of the company." But the plaintiff himself gave evidence that he considered himself a *free agent* once the suit land was allocated to him, and he had no further business with 2nd defendant. It is this attitude, it was urged, which "led the plaintiff to ignore all the pleas that were sent to him and other members of the company to make additional share-capital payment in order to save [the whole parcel of land]…. from being sold by Mukinye Enterprises."

Counsel urged that the entire property was still *owned and registered in the name of 2nd defendant*, a limited liability company governed by its own memorandum and articles; and DW3 had testified that the articles of association allowed the company to hold a *lien* over members' shares, and the shares in this case represented the suit plot. Counsel urged that, upon the plaintiff failing to comply with the company's resolutions, he lost his plot, but was entitled to a *refund* for his paid-up shares; and so he was not the *legal owner* of the suit property.

(b) ***Does 1st Defendant have Legal Ownership over the Suit Premises?***

Learned counsel submitted that the 1st defendant, as at the time of trial, did indeed have *legal ownership* over the disputed property, and the following elements represented the indicia of such ownership:

(i) he is in physical occupation of the suit premises and he has accomplished thereon substantial developments containing a permanent house and other amenities; and he resides, as he has been residing, on the said property with his family continuously since 1997;

(ii) he has in his possession a sale agreement as evidence that he was a bona fide purchase for value from ***Suleiman Gakuria****;*

(iii) he has in his possession receipts and a share certificate issued by 2nd defendant-company;

(iv) he has in his possession a letter of allotment by the Government of Kenya through the Commissioner of Lands, for the suit land;

(v) he has a certificate of lease (title deed) issued to him by the Government of Kenya, showing him to be duly registered as the owner under the Registered Land Act (Cap. 300, Laws of Kenya).

Counsel invoked the terms of s. 27 of the Registered Land Act(Cap. 300) which provides that [s. 27 (b)]

"*the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto* ……" Where such rights are acquired for valuable consideration, s. 28 of the Registered Land Act provides that these rights "*shall not be liable to be defeated except as provided in this Act … and shall be held by the proprietor …. free from all other interests and claims whatsoever….'* These provisions, ***Mr. Kibatia*** urged, comprehensively defined the 1st defendant's rights of ownership over the suit premises.

Counsel urged that the registration details of the 1st defendant's *certificate of lease*, duly executed and sealed by the government's Lands Registrar, left no doubts as to the *authenticity and validity* of the title. Section 37(1) of the Registered Land Act provides that: "*Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed until the contrary is proved."*

Counsel urged that the *plaintiff* had presented no document nearly so weighty and so valid, to dislodge the credibility of the 1st defendant's case; the plaintiff was only relying on a *share certificate issued by the 2nd defendant-company* to prove his ownership. Counsel cited the case, ***Micheal Githinji Kamotho*** v. Nicholas Mugo, Nbi Civ. Appeal No. 53 of 1995, in which the Court of Appeal held that a party could not resist a claim of ownership on the basis of a letter of allotment, when his adversary is the *registered proprietor*. Similarly in ***Lilian Waithira Gachuki v. David Shikuku Mzee,*** Eldoret H. Ct Civ. Case No. 10 of 2003 it was held by ***Dulu, J*** that:

"Legally a letter of allotment is an intention of the Government to allocate land, [but] it is not a title; therefore a letter of allotment cannot be used to defeat [the] title of a person who has beeen registered as the proprietor of land."

(c) Is 1st Defendant a Trespasser?

Counsel urged that the 1st defendant's indicia of ownership showed him to be the *legal owner* of the suit land; he was not a trespasser. He had, besides, come into possession and ownership after taking all the required steps: he ascertained from 2nd defendant that the company's records showed ***Suleiman Gakuria***, the vendor, to be the owner; he entered into a written, legally-binding sale agreement with the owner, with the approval of the 2nd defendant-company; he paid the entire consideration agreed upon; he paid the required transfer fees; and he ascertained that nobody else was in possession of the suit land, or had staked any claim to the same, at the time of sale and purchase of the same; he fenced the land, and constructed his residential premises thereon; he continued in possession, and with his works, without any injunctive orders being issued against him.

Counsel urged that 1st defendant could not have been a trespasser. ***Halsbury's Laws of England***, 3rd ed. Vol. 38 (at p. 744) thus states the relevance of the *possession* question, in any claim in trespass:

"Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action for trespass to land is the person who was, or who is deemed to have been, in possession at the time of the trespass. The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since mere right of property without possession is not sufficient to support the action."

Counsel urged that even were the plaintiff to be the owner, which he is not, he could not sustain action in trespass; for in his own testimony, the day he was given a share certificate, he went away to the Rift Valley, and remained there. So, counsel submitted, quite correctly, in the light of the evidence on record, "the plaintiff was never in possession of the suit premises."

(d) The 2nd Defendant had Lien over all shares and was entitled to make a call on members for additional share-capital subscriptions

Learned counsel contested the claim by the plaintiff that once he got share certificates, the allocated land was his property which he could dispose of on his own, at will. For the 2nd defendant-company, by virtue of the operative management regulations, had a *lien* over its shares. The provision for lien is made in the First Schedule to the Companies act (Cap. 486. Laws of Kenya), clause 11:

"***The company shall have a first and paramount lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a first and paramount lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by him or his estate to the company, but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien, if any, on a share shall extend to all dividends payable thereon.***

"***The company may sell, in such manner as the directors think fit, any shares on which the company has lien, but no sale shall be made unless a sum in respect of which the lien exists is presently payable……"***

Counsel urged that all endeavours, as shown by the evidence, were made by 2nd defendant to reach shareholders and to require additional payments on shares, but the plaintiff made no response; and this was a basis in law for 2nd defendant to move by virtue of clause 33 of the First schedule to the Companies Act aforementioned, which provided for forfeitures.

(e) Did the Plaiantiff Prove his claim based on Fraud?

Learned counsel urged that the plaintiff had failed to prove his claim based on fraud and deceit. The law governing such a claim is well settled. In Mutsonga v. Nyati [1984] K.L.R. 425 it was thus held, on this point:

"***Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer."***

Similarly in Koinange & 13 others v. Koinange [1986] K.L.R. 23, it was held that:

"***The party alleging fraud …. had the burden of proving it and they had to discharge that burden. Allegations of fraud must be strictly proved."***

Counsel submitted that the plaintiff in the instant case had failed, on the foregoing test; "no proof was advanced to show fraud and/or deceit on the part of the defendant."

(f) Principles of Equity – Do they Turn against the plaintiff?

Mr. Kibatia urged that equity does not aid the indolent: and the plaintiff –

"*Kept away from his company for over twelve years without bothering to follow up on [the status] of his plot. He never took possession of it or even fence it. He appears not to have listened to the radio or read newspapers. He never informed his company of his change of address."*

K. SUMMARISING THE EVIDENCE

Evidence was led by the plaintiff, the 1st defendant, and two witnesses for the defence. I have reviewed all their evidence systematically, and it brings out certain *facts* which may here be summarized.

The plaintiff became a member of a land-buying company, namely 2nd defendant, in the early 1980s, and

his expectation was that through the corporate activities of the company, he would *ultimately* acquire a plot of land in the Kasarani-Njiru area of Nairobi. The company subsequently held a balloting forum for its members, and the plaintiff picked up ballot No. 197, which, notionally, was attached to a *plot* of that number, being part of a larger parcel of land owned by the company. The plaintiff was given *share certificate* No. 726, as the basis of the land allocation arrived at through balloting. This certificate was issued on *4th July, 1986.*

The 2nd defendant's whole swathe of land (L.R. No. 8479)had been purchased from another company, known as Mukinye Enterprises; and 2nd defendant was looking to complete payment in that regard, from the proceeds of share subscriptions by its members. In 1989 the 2nd defendant, after endeavouring by several methods to reach all its shareholders, decided to make a *call on shares*; and whereas most members responded by making the additional payments, some elected to claim back their subscriptions, and to leave the company. Some members, such as the plaintiff herein, *did not respond*. The company moved to *repossess* plot allocations earlier granted to members who did not pay up on the calls made, and one of the plots affected was the suit premises, which was re-allocated to one ***Suleiman Gakuria Kuwehan*** who, in 1994, sold it off in a *substitute allocation by 2nd defendant* to the 1st defendant herein.

The 1st defendant after paying up the required share contribution, and after paying off ***Suleiman Gakuria Kuwehan,*** set about *fencing the suit land and*, over the next several years, *constructed upon it a permanent residence* supplied with the necessary services, and by 1997 he was *residing on it with his family* as he continues to do, to-date. The plaintiff made *no appearance*, and posed *no challenge* to 2nd defendant's *quiet possession* until 1998, when he now filed suit, though without seeking any injunctive orders against 2nd defendant. It was during the pendency of suit that 2nd defendant's rights over the suit land were consummated, with the title deed there for being issued to him by the government's Lands Office. Since then, 2nd defendant's has been *the* custodian of the relevant *indicia of legal ownership* of the suit land.

The plaintiff challenges the foregoing *status quo*, and contends that the law stands on *his* side as he prays that this Court do declare him the legal allottee and owner of the suit land; that 1st defendant's title deed be declared null; that 1st defendant be declared a trespasser; that all such share certificates as 2nd defendant may have issued to 1st defendant, be nullified; that 2nd defendant be ordered to rectify its register, to reflect the status of the plaintiff as the true allottee of the suit premises; that the defendants be mulcted in costs.

L. ANALYSIS, AND APPLICATION OF LAW

This suit, in my judgment, arose entirely out of a misapprehension of the *two distinct phases* in the transactions affecting the suit land. In the first phase, the suit land was only one of the many plots comprised in a swathe of land, the owner of which was, exclusively, the *second defendant*. At that stage, the legal relationship between 2nd defendant and its many members, had *no expression in land rights, as a matter of law,* but was founded on *share-holding*; and this relationship stood to be regulated exclusively within the terms of the *company management principles,* based on the memorandum and articles of association of the company. The company, therefore, was recognized as having a *lien over its shares* not fully paid for, and it could make *calls* on partially paid-for shares; the company could even exercise powers of *forfeiture,* just as was stated in the evidence by DW3. It follows, therefore, that when 2nd defendant called on members to pay-up on issued shares, this call was binding too, on the plaintiff, even though he ignored the call.

There is no doubt that the plaintiff was in default, as this emerges from his own evidence. In the plaintiff's words:

"*The moment I took the ballot, I had nothing to do with the company. The land was mine. I did not expect anyone to trespass on my land or claim title to it."*

The plaintiff confirmed that he dealt not with 2nd defendant, from the moment the suit land was *tentatively* allocated to him; he said:

"*I knew the plot was mine, once I got the certificate; so I went home. I never resigned as a member. I continued to be a plot owner and a shareholder. After I got the certificate, I went to the Rift Valley and stayed there. I did not write to say I had now moved from Kikuyu to the Rift Valley.*"

As already noted, the suit plot, at that early stage, *in law,* belonged to *2nd defendant* – and so it is not true that the plaintiff had become the *owner.*

Since the tentative allocations of plots through balloting were linked to *company membership*, it followed that those who ceased to be company members, or failed to comply with company resolutions, would have *no basis* for laying claim to the said plots; and moreover, the company could require them to make further share-subscriptions, as a condition for retaining the notional land allocations.

In the *second phase* of the transactions touching on the suit land, ownership status depended on *grant of instruments of title* by the Government's Lands Office. Whereas 1st defendant went through the entire second phase, and became the official *Government allottee*, as well as the *duly registered holder of the title deed*, the plaintiff stopped at the *first phase*, whereat, furthermore, he only had a *notional allotment*, by a *company* whose decisions he failed to comply with.

On that basis it must be stated that it is 2nd defendant, rather than the plaintiff, who has *rights of ownership* to the suit land.

Although the plaintiff alleged *fraud* and *deceit*, as the basis upon which the 2nd defendant acquired ownership of the suit land, he did not prove it; the law on this matter is stated by the High Court ***(Kneller, J)*** in ***Mutsonga v. Nyati*** [1984] KLR 425 (at p. 439):

"Charges of fraud should not be lightly made or considered…..They must be strictly proved and although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required…..In fact a high degree of probability is required ….It is very much a question for the trial judge……Whether there is ….evidence to support an allegation of fraud is a question of fact……

"Again it would not be right to answer this issue on the impression any witness or party made or his demeanour alone. It would have to be tested against documentary evidence and their conduct before and after the event and the probability of the account given by them……"

From the record of proceedings, and from the many documentary exhibits produced in Court, there is, in my opinion, nothing to show fraud on the part of the defendants, in regard to the transactions relating to the suit premises. I would add that neither defendant, nor their witnesses, impressed me during trial as a person of questionable demeanour, and I have to conclude that they gave truthful evidence. It is, by contrast, the plaintiff who failed in one respect or so to impress me as a truthful witness; firstly he lacked candour, in my perception, when he maintained that his distinctly *inchoate claim* to the suit land, in respect of which he would not even render dues to the corporate body holding out to him a privilege, was superior to the officially-registered title of the 1st defendant. Secondly, he had averred in Court that he *did not know* if the 1st defendant had put up any building on the suit land, only to contradict this later by acknowledging that the 1st defendant had constructed a stone house.

With a clear and *transparent paper-trail* showing his process of acquiring the suit land, and having obtained all *indicia of legal ownership*, the 1st defendant could not be a trespasser, and so the claim under the trespass-head *fails.*

I hold that the plaintiff has *not* proved his case against the defendants, and I hereby dismiss the suit, and order that he shall pay the costs of both defendants.

Decree accordingly.

DATED and **DELIVERED** at Nairobi this 3rd day of February, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Plaintiff: Mr. Namada

For the Defendants: Mr. Kibatia