

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIOT NO.120 OF 2001

DAVID WANJOKI WAMUGI APPELLANT

Versus

**MUHOTETU FARMERS CO. LTD
RESPONDENT**

JUDGMENT

The plaintiff's claim before court is for a declaration that the plaintiff is the lawful bona fide owner/allottee of Plot No. 507 Gathuria in Muhotetu Farmers Company Limited. The plaintiff sought that the court will direct the defendant to fulfill its contractual obligation by accepting the balance of the survey fee in respect of that plot. Further that the defendant be directed to issue the plaintiff with a title deed to that plot. In its defence the defendant denied that the plot belong to the plaintiff but rather it belonged to a third party. At the hearing of this case the plaintiff stated that he was a member of the defendant company. He said that he is a holder of 3 shares in that company. Each share represented 12 acres of land. That therefore he was entitled to 36 acres. However on the day of balloting for land that is on 7th May 1983 he was only given a ballot for two shares representing 24 acres. He produced in evidence the vote card for those two shares representing plot No. 502. He however said that he complained to the defendant's directors who after hearing his complaint and after checking and confirming that he was entitled to another extra share gave him a vote card representing plot No. 507. On being examined in chief, the plaintiff stated that he had paid kshs. 1,800 for the 36 acres. The purpose of that payment was survey work to be undertaken for the two plots. He produced before court the receipt in respect of that payment. He had rented to someone for cultivation plot no. 507 and later he sold eight acres of that plot to him. That Person has todote constructed some house and continued to cultivate the land. He produced before court an agreement for sale in respect of the eight acres. The plaintiff further produced to court a letter dated 30th June 1997 addressed to the defendant informing them that he had sold the 8 acres of plot 507. Later the plaintiff approached the defendant with a view to making payment in respect of the two plots but the defendant refused to accept the payment for plot 507 but only accepted in respect of plot 502. The reason the defendant refused to accept that payment he was told was because the share represented by plot No. 507 was not his. He wrote a letter complaining about the decision of the defendant to divisional officer Kinamba Division. On being cross examined by the defendant advocate the plaintiff confirmed that one of the directors of the defendant company at the time he was allocated plot No. 507 was his brother namely Kinyanjui. He said that he sold the eight acres of plot 507 in 1997. He confirmed that on the day of balloting 7th May 1983 he balloted only for two shares and was issued with a vote card for plot No. 502. He accepted that for him to have been able to participate in the balloting he needed to have cleared all the money required for the number of shares. The plaintiff was unable to confirm how much he had paid in respect of the shares by the time the balloting took place in 1983. He however said that he produced his receipts to the then directors of the defendant who verified his entitlement to the three shares. For one share he said one had to pay kshs. 2,100. By 7th May 1983 the plaintiff could not say how much he had paid to the defendant for his shares. It was three days after the balloting took place that he was called by the defendants committee and on hearing the complaint they gave him the vote card for plot 507. He was however unable to give a specific date when that vote card was given to him or when a decision was made by the then directors to give him that vote card. PW 2 stated that he is a member of the defendant company and had been so since 1967. He at one time was the vice chair and later became the secretary of the board of directors. He stopped being the secretary in 1997. He confirmed the plaintiff was member of the company. On being shown the vote card for plots 502 and 507 he confirmed that his signature was appearing on the same. He confirmed that those vote

cards were issued to the plaintiff and that they were genuine. He said that they were the defendant company's documents. Balloting for plots was done by members on 7th May 1983. The plaintiff on 9th May 1983 complained that he had not been given one of his shares. The board of directors on deliberating on that complaint found the claim to be true. As a consequence the board gave the plaintiff the 3rd share separately so that he could in total have three shares. This witness said that by profession at that material time he was a teacher in Nyeri. That the plaintiff made his complaint in the defendant office and it was later that he heard about the plaintiff's complaint. On cross examination this witness said after balloting he returned to his teaching job in Nyeri. He however was present when a decision was made to give the plaintiff plot no. 507. That although that decision was recorded in a minute of the meeting that record was kept by the vice secretary. This witness did not produce that minute. On further questioning this witness said that he was not sure whether any plots remained after the balloting on 7th May 1983. That the register reflecting what plots were given to the members was filled by the vice secretary. He confirmed that the register shown to him by defence counsel reflected the name of Bernard Mutua Kinyingi as the owner of plot 507. That entry however was cancelled and instead the plot allocated to that person was shown as number 432. He said that when the plaintiff was given plot no. 507 the board of directors did not confirm from the register whether that plot was available to be allocated to the plaintiff. This witness was unable to confirm how much the plaintiff had paid to the defendant for the 3 shares. PW 3 was the person who purchased 8 acres from the plaintiff of plot 507. He said that he purchased the eight acres in 1997 for Kshs.297,000. He confirmed that the agreement earlier on produced by the plaintiff was the agreement they entered into in respect of transaction. The defendant's case was supported by the evidence of the present director of the defendant company. He said that he had been a secretary of the board for over 20 years having been elected on 18th May 1987. That when he and other board members were elected into their office of directors in 1987 they found a lot of problems relating to allocation of plots by the previous board and in particular there was the problem relating to plot no. 507. The problem they encountered was that Bernard Mutua Kinyingi approached them and told them that he had not been allocated a plot. When they checked that complaint they found that he had successfully balloted for plot No. 507. As a committee they sat down to deliberate on the issue and since they did not know what the previous board had done in respect of that plot, they decided to subdivide a public utility plot to be able to allocate Kinyingi with his shares. Kinyingi was given 12 acres represented by plot No. 432. The plaintiff thereafter approached the board and told them that he was the owner of plot 507 and he had a card representing that plot. The committee found that the plot did not belong to the plaintiff. The witness stated that the balloting which took place on 7th May 1983 resulted in each member being given only 1 vote card. The balloting was done systematically in that there were six boxes each representing the acreage the members were entitled to. One box represented those who had 72 acres. The other represented those with sixty acres. The third represented those with 48 acres. The fourth represented those with 36 acres. The fifth represented those with 24 acres and the sixth represented those with 12 acres. Each member was given one ballot representing the acreage he had paid for. The member would then cast his ballot in the correct box for the acreage he had paid for. Consequently no member would end up with more than one vote card. Each share costs Kshs.2,100. It was as a result of that the board found that the plaintiff was not entitled to plot 507 and could not rightly be a holder of 2 vote cards. He said that there was no board minute to support the plaintiff's contention that a resolution was passed for him to be allocated the extra share. This witness then took the court through the register to show that the plaintiff had been allocated plot 502. Later there is a note that the plaintiff was the holder of plot no. 502 and 507. The register also shows that originally plot No. 507 was registered in the name of Bernard Mutua Kinyingi. This entry however was later cancelled and the plot reflect under this name after the cancellation was number 432.

I have considered the submission made by counsels in support of their clients claim. The plaintiff submitted that in view of the vote card for plot 507 the defendant could not be allowed to adduce oral evidence to contradict the same. The plaintiff relied on **Section 97(1)** of the Evidence Act. The argument by the defendant as I understand is that the plaintiff although holding a vote card for plot 507 he was not entitled to the extra share represented by that card. That indeed was the defence filed by the defendant in this case. Having raised that defence the burden then shifted the plaintiff to prove that he was entitled to own that plot. The plaintiff was unable to prove payment for the 3 shares he claims from the defendant. Even on being cross examined he was unable to state how much he had paid for the shares. His witness the former secretary of the defendant company could not also state how much the plaintiff had paid for

the shares. This was despite the fact that in his evidence he said the plaintiff had proved his right to the extra share of the company. I therefore do not accept the submissions by the plaintiff's counsel that the existence of the vote card precluded the defendant from relying on oral evidence. The plaintiff further argued that the defendant is estopped from denying the plaintiff's claim to plot no. 507. The plaintiff relied on the vote card and the register which reflected him to be the owner of the said plot. That very same register reflected Bernard Mutua Kinyingi as the owner of that plot. The defendant's witness stated that it was as a result of the complaint by Kinyingi that he had not been given that plot that an alternative plot had to be found for him. The raising of the issue of estoppel has to be considered in the background of the defence of the defendant that is, that the plot 507 did not belong to the plaintiff and in the background of the evidence adduced before court. The defendant's stand in this case was that it was not sufficient for the plaintiff to hold a vote card for that plot. The plaintiff had to prove his entitlement to hold that vote card. Further that each member was entitled to only one vote card and not two as is the case with the plaintiff. The doctrine of estoppel therefore cannot be raised by the plaintiff in this case. The issues that I see presenting themselves for consideration by this court are:-

1. Did the plaintiff ballot for plot No. 507?

2. Is the plaintiff entitled to a declaration that plot No. 507 is his?

3. Did the plaintiff sell 8 acres of plot 507 with the full knowledge of the defendant?

The plaintiff accepted that when the balloting took place on 7th May 1983 he only balloted for 2 shares represented by 24 acres. Following that balloting he was given a vote card for plot no. 502 of 24 acres. The plaintiff accepted that for him to be entitled to ballot for the shares he was claiming he needed to have cleared all the payments in respect of those shares. In evidence he stated that he had made payments for the three shares but could not remember how much he had paid. He said that he was issued with receipts for those payments but did not produce the receipts. Although he said that one had to pay kshs. 2,100 he could not say how much he had paid himself. He said that he complained to the defendant company about his missing one share three days after balloting. It was after his complaint that he was given by the committee deliberating on his complaint vote card for plot No. 507. By that evidence it is clear that the plaintiff did not ballot for plot 507. That evidence is contrary to his pleading. It cannot go unnoticed that one of the directors of the defendant company Mr. Kinyanjui was a brother to the plaintiff. He was a director when a decision was made to give the plaintiff vote card for plot 507. Defence evidence which was not challenged in cross examination was that each member was entitled to one vote card representing the number of shares they had paid for. The plaintiff had two vote cards but only one was as a result of balloting. The answer to the first issue hereof is that the plaintiff did not ballot for plot no. 507. In respect of the second issue I find that it cannot be stated that the plaintiff is entitled to a declaration that he is the owner of that plot in view of the fact that he had failed to show that he paid for the 3rd share. Not only had he failed to show he had failed to state how much he paid if at all. On balance of probability the plaintiff has failed to prove that he is entitled to that declaration. In respect of the third issue the plaintiff notified the defendant of the sale of eight acres on the same day he sold the same. The sale agreement is dated 30th June 1997 which is also the date of the letter informing the defendant of that sale. The defendant therefore did not have full knowledge of the sale prior to that date. I have considered in entirety the plaintiff's claim and have found that on a balance of probability the plaintiff has failed to prove his entitlement to the third share. Accordingly the plaintiff's case is hereby dismissed with costs to the defendant.

DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE