



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

Civil Case 1113 of 2004

JOSEPH MUTUA KYENZE PLAINTIFF

VERSUS

CLIFF ONGERI ONDARI 1st DEFENDANT

ISAAC ONGUBO KIBWAGE 2ND DEFENDANT

JOSEPH KALUNDE 3RD DEFENDANT

JUDGMENT

1. Land and Environmental Law Division
2. Subject of main suit land – fraud

LR12715/321/IR

IR No.44738

Original No.217, No.591 share certificate

Syokimau Farm Ltd

- i) Defendants 1 and 2 wanted to buy suit land 6 February 1988 defaulted in payment of agreement of sale.
 - ii) Agreement rescinded and deposit returned
 - iii) Plaintiffs lawful owner of land as of 1988
 - iv) 11 December 1997 – 1st and 2nd defendant fraudulently transferred suit Land and registered in name with abatement of 3rd defendant
 - v) Fraud
3. Prayer – Revocation of Title NO IR 40213/3 - fraud
 4. Defence for 1 and 2 filed – denial

Interlocutory Judgment defendant No.3

5. Held: Fraud
6. Case law - nil
7. Advocates

A. Kimathi for Arimi Kimathi & Co. Advocates for the plaintiff – present

S.K. Meto for Kipsang, Murugi Mugo & Co. Advocates for the defendants

1: Background

1: Joseph Mutua Kyenzi (the plaintiff) was allocated land within the Syokimau Farm Ltd. This was plot No. 427 letter of an allotment 217 and share certificate 591.

2. At one time Cliff Ongeru and Isaac Oguo Kibwaga (the 1 and 2 defendants herein) intended to buy the same piece of property. They defaulted in the payment and the agreement was rescinded. Their deposit was returned to their said advocate.

3. The plaintiff herein was the lawful person allocated some sometime in 1988. In the meantime M/s Syokimau Firm, Ltd were allocated the original title deed grant LR44738 under the Registered Lands Act with the term running from 1 November 1983.

4. The defence filed by defendant 1 and 2 admits that the plaintiff was indeed the registered owner of LR number 12715/231. IR number 44738 the plaintiff alleged that the 1 and 2 defendant with collusion of 3rd defendant fraudulently caused the suit property to be transferred and register in their name.

6. The 3rd defendant herein was the deputy Mayor of Machakos. He neither entered appearance nor filed defence in this suit. There is Interlocutory Judgment entered against him on the 8 December 2004 by the deputy registrar of this court (Order 48 Civil Procedure Rules).

7. The defence by 1 and 2 defendants was that though the plaintiff was the registered owner they followed the laid down procedure and acquired the land legitimately. That there was no fraudulent dealing. They in fact had purchased the suit premises. The plaintiff, they alleged "is" just out to make money out of justice in his claim." The plaintiff in reply denied this.

Agreed Issues

8. The parties had agreed to issue for determination of this court on 12 May 2006. On the day set down for hearing the advocate for 1 and 2 defendant changed from M/s Kili Korir & Co. to M/s Kipsang Murugi Mugo & Co. Advocates.

9. The issues for determination remained the same. The new advocates obtained an adjournment but failed to pay the getting up costs on the day. The defendant called no evidence.

10 It is the plaintiff who gave evidence and from the proceeding and that evidence that the issue be accordingly determined as follows:-

11. The defendant 1 and 2 admitted that the registered owner of LR12715/321 IR| No.44738 the suit property in question has always been the plaintiff. The property, according to the defence was purchased and transferred to the defendant 1 and 2 lawfully following laid down procedure. The plaintiff on the other had denies this and stated that the transfer was fraudulently acquired without his knowledge.

12. I have noted the demeanour of the plaintiffs who appears to be a truthfull witness. I further note that this dispute had been on going since 1987/1988 whereby all along the plaintiff had been said to have been the original allottee and registered owner. That subsequently the 1 and 2 defendant were fraudulently registered as owners yet the two defendants claim to have bought the land. From the evidence to court of a letter of 1 September 1988 the defendants 1 and 2 had intended to purchase the suit premises in question **BUT** the said agreement was rescinded due to non payment of the full purchase price. The defendants deposit was accordingly refunded of Ksh.30,000/-.

III: Finding

I give the plaintiff his prayers and accordingly revoke title 40213/3 registered in the names of 1 and 2 defendants having been fraudulently acquired and substitute the name of the plaintiff.

13. I decline to award mense profits as the plaintiff did not demonstrate and speak or on this point.

14. I award costs to the plaintiff.

Dated this 31st day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

A. Kimathi for Arimi Kimathi & Co. Advocates for the plaintiff – present

S.K. Meto for Kipsang, Murugi Mugo & Co. Advocates for the defendants

