



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

Civil Case 2722 of 1992

JOSEPHAT KITAVI..... PLAINTIFF

VERSUS

JOSEPHAT KITAVI KIOKO..... 1ST DEFENDANT

SYOKIMAU FARM LTD..... 2ND DEFENDANT

GOVINDJI MULJI DODHIA..... 3RD DEFENDANT

JUDGMENT

The Plaintiff's suit herein is grounded on the allegations contained in the Amended Plaintiff filed in this Court on 31st October 2001 which basically amended the Plaintiff's Original Plaintiff filed on 20th May 1992 by including an additional prayer (e) as follows:

(e) IN THE ALTERNATIVE an order that

the first and second defendants do

transfer to the Plaintiff L.R. No.

12715/539 in lieu of L.R. No. 12715/27.

The Plaintiff, Josephat Kitavi has sued Josephat Kitavi Kioko (1st Defendant), Syokimau Farm (2nd Defendant) and Govidji Mulji Dodhia (3rd Defendant) seeking judgment against the three of them jointly and severally as follows:

(a) An urgent temporary injunction to restrain

the third defendant, his agents, servants, and or employees from proceeding to occupy the (said) suit premises and also from alienating, dealing and/or disposing of the same pending the hearing and determination of this suit.

(b) An order restraining the second defendant, its agents and or servants from dissolving the Company until the hearing and determination of this suit

(c) A declaration by this Honourable Court to the effect that the Plaintiff is entitled to the suit premises in exclusion of all the other defendants

- (d) An order of this Honourable Court to cancel the first defendants registration and the subsequent registration of the suit premises and to substitute the registration thereof in favour of the Plaintiff**
- (e) IN THE ALTERNATIVE an order that the first and second defendants do transfer to the Plaintiff L.R. No. 12715/539 I lieu of L.R. No. 12715/27**
- (f) General damages**
- (g) Exemplary damages, the quantum thereof to be determined by this Honourable Court at the hearing**
- (h) Loss of income in respect of the suit premises, the quantum thereof to be determined by this Honourable Court**
- (i) An order for specific performance against the second Defendant in respect of the suit premises**
- (j) Costs of the suit**
- (k) Such other or further relief as this Honourable Court may deem just and fit to grant.**

The Plaintiffs claim originates from an alleged allocation and transfer of a 5 acre piece of land known as L.R. No. 12715/27 (Plot No. 182) to the Plaintiff in or about 1980 by the 2nd Defendant and which, according to the Plaintiff was thereafter wrongfully, negligently and/or fraudulently transferred by the 2nd Defendant to the 1st Defendant who subsequently transferred the same to the 3rd Defendant.

The Plaintiff cites fraud on the part of all the Defendants and particularizes the same in his Amended Plaint as follows:

I. Particulars on the part of the 1st Defendant

The 1st Defendant was fraudulent in selling the suit premises to the third Defendant in that:

- (a) The First Defendant had no legal title to the suit premises**
- (b) The First Defendant was not the allottee of L.R. No. 12715/27**
- (c) Conspired with the Second Defendant and together forged and collected the Plaintiff's certificate of title.**
- (d) Received and/or obtained Certificate of Title of Plot No. 182 (L.R. No. 12715/27) with full knowledge that his parcel was Plot No. 239 (L.R. No.12715/539) of which he also obtained a Certificate of Title.**
- (e) Knew that he was not Josephat Kitavi the rightful allottee of the suit premises.**
- (f) Sold the suit premises to the Third Defendant with full knowledge that the Certificate of Title was a forgery and/or obtained fraudulently.**

II. Particulars of fraud/negligence on the part of the Second Defendant.

- (a) released the Plaintiffs title L.R. No. 12715/27 to the first Defendant with full knowledge that the first Defendant was not the allottee of the suit premises**

Throughout the examination in chief the Plaintiff did not disclose that his name as appearing in his national identity card is Josephat George Musembi. It is only in cross-examination that he admitted that he was known by that name and then alluded to the fact that his father had paid for the shares on his behalf using the names Kitavi Kioko appearing on the receipts, which names, according to the Plaintiff, his father called him. This piece of evidence is suspect since the Plaintiff avoided it all together in his examination in chief being fully aware that the issue of names was central to his claim. The Plaintiff's reference to the 1st Defendant as Josephat Kitavi Kioko and suing him in that name is a clear admission on the Plaintiff's part that those are the 1st Defendant's names. In re-examination by his own advocate the Plaintiff admitted also that the names Japheth Kitavi Kioko (I.D. No. 3499275/66), Josephat Kitavi Kioko (I.D. No.3499275/66), and Kitavi Kioko (I.D. No. 3499275/66) as appearing in documents shown to him and which formed part of the 3rd Defendant's bundle of documents referred to one and the same person. There is no doubt that that person is the 1st Defendant.

The only witness who I thought would have thrown a light on the confusion as to names and therefore unravel the mystery surrounding the allocation and transfer of Plot No. 182 by the 2nd Defendant was D2-W.1, since the cause of action herein arises from the activities of the 2nd Defendant, a land buying Company incorporated solely for that purpose, and which by the time of the hearing the suit had completed the process of purchasing and distributing land for and on behalf of its members, the Plaintiff and the 1st Defendant included.

According to the oral evidence adduced for the 2nd Defendant by its Chairman, the land acquisition process involved the purchase of shares in the Company which shares then entitled a member to own a piece of land proportionate to the value of the shares. The witness, told the Court that as far as he knew a member could buy only 10 shares which entitled him to a 5 acre plot of land. The shares were paid for at the 2nd Defendant's offices whereupon one was issued with a receipt and a share certificate. Thereafter allotment letters were sent to members at their last known address, who would then proceed to the offices of the Company's advocates, M/S Waki & Company and pay the requisite fees for the processing of Title Deeds. In order to obtain title, a member was required to produce his identity card, share certificate and the allotment letter issued to him.

Confusion arises from the evidence adduced as to whether the Plaintiff was actually a member of the 2nd Defendant since his name as appearing in his identity card is Josephat George Musembi, which as clearly stated by the 2nd Defendant's witness does not appear at all in its records. The witness stated that according to the records of the 2nd Defendant the disputed plot No. 182 (L.R. No. 12715/27) was allotted to Josephat Kitavi and that the title to the same was collected by one Kitavi Kioko. Although the said witness D2-W.1 told the Court that both the Plaintiff and the 1st Defendant were members and shareholders of the 2nd Defendant and that their names would appear as Josephat Kitavi and Kitavi Kioko respectively, he had no record and did not produce the members' register to prove this. He told the Court that he himself was a shareholder and Chairman of the 2nd Defendant and therefore well versed with the land allocation procedure. He said it was vital for one to produce his national Identity Card, share certificate and allotment letter when collecting one's Title Deed. To quote him he said in cross examination that

“I do not think that it would have been possible for a Title to be issued in the absence of these documents.”

The witness also testified that the Company could only issue Titles to persons who proved ownership. It is surprising that the said witness was emphatic in suggesting that the Plaintiff was the rightful allottee of plot No. 182 (L.R. No. 12715/27) and yet claim not to have known that the Plaintiff's real names as appearing in his National Identity Card are Josephat George Musembi. The witness says that he met the Plaintiff when he came to collect his Title Deed and found the same to have been collected by another person. If that be the case, it would have been incumbent upon the witness, who was emphatic that titles could only be collected by those who proved ownership and produced, among other things, a national identity card, to confirm the Plaintiff's identify (as appearing in his identity card) and proof of allotment

and purchase before concluding that the collector of the Title Deed to Plot No. 182 was the “wrong person”. That this witness is unaware that the Plaintiff’s name appears in his national identity card as Josephat George Musembi begs the question whether he actually knew the Plaintiff as well as he claims to. His evidence that the Plaintiff is the Kitavi Kioko appearing in the relevant share certificate and allotment receipts is most suspect.

The testimony of D2-W1 was that M/S Waki & Company were the appointed agents for the purposes of obtaining the Title Deeds. He did not mention M/S Ndunda & Company at all. He also testified that allotment letters were collected personally and never posted. His evidence that the Plaintiff collected his allotment letter clearly contradicts the Plaintiff’s own testimony since the Plaintiff himself clearly stated that he never received his allotment letter. The letter from Ndunda & Company is not explained at all. Nor is the role of the said advocates in the plot allocation and transfer from the 2nd Defendant to its members or shareholders.

Both the Plaintiff and D2-W1 were hard pressed to convince the Court that there is no way the 1st Defendant could have been allocated plot No. 12715/27 since, according to them, one could only buy a maximum of 10 shares in the 2nd Defendant which translated to one plot of 5 acres. The two were emphatic that it was not possible for any one to buy more than 10 shares or to acquire more than one plot. The 2nd Defendant has maintained that he was rightly allocated two plots. This is supported by the evidence of D1-W.3 who stated that he himself had purchased 5 plots and that one could buy as many plots as one could afford. The claim that there was a limit of 10 shares and so be entitled to one plot was not supported by any evidence in the absence of a resolution or other documentary proof from the 2nd Defendant.

The Court has noted that among the receipts produced by the Plaintiff in support of his claim are two receipts for shares purchased in the names of Josephat Kitavi. Receipt No. 2350 dated 12th October 1970 is said to be for five shares, whilst receipt No. 3630 dated 11th May 1979 is for the purchase of Ten Complete Shares.

The said receipts having been produced by the Plaintiff in an attempt to prove his acquisition of L.R. No. 12715/27 (Plot No. 182) clearly contradict his own contention that one’s allocation was limited to 10 shares only since the two receipts represent 15 shares issued to Kitavi Kioko. The Plaintiff admitted that copy of the allotment letter produced as “Ex. D 3-3” and which the Plaintiff had marked as MFI P.1 is what was shown to him as having been collected by the 1st Defendant. The copy of the Share Certificate produced as “Ex D.3” is identical to the original document produced by the Plaintiff. There is no dispute that the said share certificate was part of the documents relied on by the 3rd Defendant in the acquisition of the Parcel No. 182, L.R. No. 12715/27 from the 1st Defendant. The latter did testify that his documents relating to the acquisition of his plots were stolen. His report to the police is proved by his witness, D1-W.2. The 1st Defendant also attested to a declaration made before an advocate concerning the loss of his said documents. The Plaintiff’s possession of the receipts and the Share Certificate is suspect since he first claimed to have bought the shares and was issued with the receipts and Share Certificate. He later changed his story to say that it was his father who bought the shares for him.

Evidence was led concerning the interrogation of the 1st Defendant by the police regarding his acquisition of the allotment letter and Title to Plot No. 182 issued against the Share Certificate produced as Ex P.2 and “Ex D3-2”. He was never charged. The 1st Defendant also testified to the loss of his Title Deed to Plot No. L.R. 12715/539 which he said is now in the hands of the Plaintiff. The Plaintiff does not explain how he came to be in possession of the said Title. He however desires that the plot in relation thereto be transferred to him and asks this Court to order that the same be done. To my mind that the documents produced by the Plaintiff in evidence, together with the Title Deed to L.R. 12715/539 were most probably among the documents reported stolen and declared so by the 1st Defendant. I do not believe that the same belong to the Plaintiff whom I do not believe to be Josephat Kitavi at all. His introduction of himself in the se proceedings as Josephat George Musembi son of Kitavi is intended to mislead the Court to believe that he was the rightful allottee of the suit premises and the bearer of the Share

Certificate produced herein as “Ex P.2” and “Ex D3-2.” Unfortunately for the Plaintiff, this Court cannot be duped in this manner. In my view if anyone ought to have been quizzed by the police regarding the disputed plot it should have been the Plaintiff himself. I find that the evidence before me does not support the Plaintiff’s claim to the suit premises at all. I have no reason to believe that the same was allocated to him and not the 1st Defendant. The reverse is more credible. I have no doubt whatsoever that the 1st Defendant was the proper allottee of both L.R. No. 12715/27 and L.R. No. 12715.539 and that had proper title to the same and that his transfer of L.R. No. 12715/27 to the 3rd Defendant was absolutely lawful. I find the testimony of the 3rd Defendant’s witness consistent and most credible as regards her late husband’s acquisition of the plot.

Based on the evidence before me I find that the Plaintiff has failed completely to prove the various allegations of fraud against the Defendant and/or negligence on the part of the 2nd Defendant and is therefore not entitled to any of the reliefs sought against them. The orders sought have no basis whatsoever and I see no reason to disturb the 3rd Defendants’ ownership of the L.R. No. 12715/27 which, as I have already stated was legally and lawfully acquired. As regards the 1st Defendant’s request that the Court orders a return of the Title Deed to L.R. No. 12715/539 to him I am unable to make any orders since the same has not been prayed for by way of a counterclaim.

In conclusion, I find that the Plaintiff has not, on the balance of probabilities, proven his case against the Defendants and the same must fail. I therefore dismiss this suit with costs to the Defendants.

Dated and delivered at Nairobi this 28th day of April 2006.

M.G. Mugo

Judge

In the presence of:

Prof. Munoru for the Plaintiff

Mr. Ongondi h/b for Uvyu for the 1st Defendant

Mr. Ongondi for 3rd Defendant

Ms. Njeri Thuku h/b for Kathambi for 2nd Defendant