



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 224 of 1996

DAVID MUTEGI NJURU.....PLAINTIFF

VERSUS

KASAMBA FARMERS COMPANY LTD.....1ST DEFENDANT

PAULINE WANJIRU.....2ND DEFENDANT

JUDGMENT

The plaintiff commenced these proceedings in the Principal Magistrates court at Nakuru in **PMCC No. 410 of 1989** but thereafter the suit was transferred to this court and was assigned the current number. In the initial plaint, the plaintiff described himself as the legal representative of Njuru Karega. In an undated amended plaint that was filed on 14th March, 1997 the plaintiff stated as follows:-

“4. The plaintiff is a full paid up member of the defendant’s company since its inception.

5. In 1982 the 1st defendant conducted balloting for allocation of individual pieces of land on L.R. No.13014 Kasambara Farm among its members and the 2nd defendant was allocated Plot No. 94 which plot upon survey was now No. 57 and is now registered as L.R. No. Gilgil/Karunga Block 1/57-92 (hereinafter referred to as the “suit premises”).

6. The 2nd defendant was also at all material times a full paid up member of the 1st defendant company through her deceased husband.

7. That upon the plaintiff being allocated the suit premises, he commenced development i.e. fenced the farm, built a house, paddocked the entire farm and ploughed 3 acres of the land in which he planted an orange orchard and the entire development is estimated at Kshs.300,000/-.

8. The plaintiff’s father, Njuru Karega died in 1975 and was buried on the suit land.

9. It was an express and/or implied term of contract between the plaintiff and the first defendant that the plaintiff would be fully settled on the plot allocated to him i.e. the suit property and would finally have been issued with title deed upon the final survey being done.

10. That in breach of the contract or undertaking between the plaintiff and the first defendant, the 1st defendant and the second defendant have fraudulently registered and issued the 2nd defendant with the plaintiff’s title to the suit property and have threatened to evict the plaintiff from the suit property.”

The plaintiff then proceeded to set out the alleged particulars of fraud as against the defendants and then urged the court to enter judgment against the defendants jointly and severally as hereunder:-

- (a) A declaration that the plaintiff is the legal owner, allottee of L.R. GILGIL/KARUNGA BLOCK 1/57-92.
- (b) A declaration that the registration of the 2nd defendant and subsequent issue of the title deed for the suit premises to the 2nd defendant was null and void as the same was done through fraud.
- (c) Cancellation of the title deed for the suit premises and an order that the same be issued in the name of the plaintiff.
- (d) A declaration that the 2nd defendant is a trespasser to the suit premises.
- (e) A permanent injunction to restrain the defendants from entering, cultivating, building or in any way interfering with the suit premises.

The first defendant did not enter appearance nor file any defence and the plaintiff requested for interlocutory judgment against it.

The second defendant filed a statement of defence and denied that the plaintiff was the legal representative of his late father and stated that he therefore had no capacity to file or prosecute the suit. The second defendant denied the plaintiff's allegations as stated in the amended plaint and added that the same disclosed no cause of action against her.

In his oral evidence before the court, the plaintiff said that he had been living in the suit premises with his late father since 1969. His father died in 1975. The plaintiff said that he obtained letters of administration of his late father's estate but what he produced in proof thereof was a Limited Grant of Letters of Administration *ad colligenda bona* issued under **Section 67(1)** of the **Law of Succession Act**. The same was issued on 9th March, 1995, long after the suit was filed in court as **PMCC No. 410 of 1989**. The Limited Grant was "*limited to the purpose only of collecting and getting in and receiving the estate*" of the deceased and doing such things as may be necessary for the preservation of the same. There was no indication that it was intended to be used for filing this suit or any other suit. I may pause here and observe that the plaintiff had no capacity to file the suit when he did so in 1989. The Court of Appeal authoritatively delivered itself on this issue in **VIRGINIA EDITH WAMBOI OTIENO VS JOASH OCHIENG OUGO & ANOTHER (1982-88)1 KAR** and in **TROUSTIK UNION INTERNATIONAL & ANOTHER VS JANE MBEYU & ANOTHER** Civil Appeal No. 145 of 1990. The purpose of letters of administration *ad colligenda bona* is to collect the property of a deceased person where that property is of a perishable or precarious nature and where regular probate and administration cannot be granted at once. It should also be noted that the appointment of a person as an administrator *ad colligenda* in respect of an estate of a deceased person does not grant him authority to take the place of the deceased for the purpose of instituting an action and more so where that grant does not bear an endorsement to the effect that it is limited to the purpose of instituting a suit. The Court of Appeal considered that issue exhaustively in **MORJARIA V ABDALLA [1984] KLR 490**. The plaintiff therefore had no capacity to institute this suit. Lack of capacity to sue renders the suit incompetent but that notwithstanding, I wish to consider other aspects of the case.

The plaintiff averred that when his late father settled in Kasambara Farm in 1969, a member could put up his house anywhere. He alleged that although members of the first defendant balloted in 1982 to pick the specific parcels of land which they were to be allocated, there was an understanding between the first defendant and its members that those members who had developed the areas which they had temporarily occupied or buried their dead on such land would not be moved but would be allowed to retain the same. However, the plaintiff was required to move to Plot No. 94 which he had picked during the balloting exercise and he protested to the first defendant and also wrote a letter to the Provincial Commissioner, the District Commissioner and the District Officer, Gilgil. He further alleged that the second defendant had been allocated their homestead and issued with a title deed. He said that the second defendant's home

was about 250 metres away from his home whereas the parcel of land which he was supposed to occupy measured 32 acres and was about 2 kilometres away. In his view, both himself and the second defendant ought to be left where they are currently since they had both buried their dead relatives on those parcels of land then they share the 32 acres proportionately.

In cross examination by Mr. Karanja for the second defendant, the plaintiff said that when they were balloting, he picked parcel No.94 which was not falling on the parcel of land on which his late father had been buried whereas the second defendant picked parcel No. 57 which was where the plaintiff's homestead was. Since parcel No. 94 was not very good, the plaintiff was given another parcel of land measuring about 7 acres as compensation for the poor quality of parcel No.94. The plaintiff's mother then moved out of parcel No. 57 and settled on the 7 acre property.

The plaintiff told the court that he had nothing to prove that the first defendant had resolved that its members who had buried their dead relatives on the parcels of land which they had occupied before subdivision of its land and the subsequent balloting were not to be moved to the parcels of land which they picked during the balloting exercise. Even one of the first directors of the first defendant, **Joseph Mwangi Wakaba, PW2** did not produce any evidence to that effect. He could not produce the company's minutes in support of the plaintiff's allegations. To the contrary, he conceded that some people who had graves and houses on the parcels of land which they had temporarily occupied had to move to other parcels of land which they picked at the time of balloting. The plaintiff further conceded that the second defendant had not committed any act of fraud in her acquisition of the suit premises. He further testified that the second defendant filed a suit against him, **RMCC NO. 981 of 1989**, claiming that he was a trespasser to the suit premises and the court declared that he was indeed a trespasser. Thereafter the plaintiff appealed against that decision but the outcome of the appeal, if any, was not disclosed.

In her defence, the second defendant said that her late husband, Allice Thuo Ngugi, was a member of Kasambara Farmers Company Ltd and had four shares. They moved to Kasambara in 1970 and put up a permanent home on a parcel of land which they occupied temporarily. Her husband died in 1975 and was buried about 20 metres away from the house. In 1982 balloting for the various sub-divisions of the land was done and she picked a ballot for parcel No.57 and was given a letter of allotment, **D. Exhibit 2**. The plot was about 20 metres from her house but in between was a road and the grave of her late husband was on that plot but the house was not and she had to demolish it. Later she obtained a title deed for the plot that was allotted to her. The parcel of land was registered as **GILGIL/KARUNGA BLOCK 1/92** and measures 8.1 hectares.

The second defendant further testified that on parcel No. 57 there were several people living there as at the time of balloting. They were:- the plaintiff's mother known as Wangeci Njuru, David Ngumo and Kariuki Wakingara. All those people moved from the suit premises but the plaintiff refused to move out. She then filed a suit against the plaintiff, **RMCC No. 981 of 1989** and the court ordered his eviction therefrom. She further testified that the plaintiff was occupying about 4.5 hectares of her land and wanted him evicted out of it.

She also referred to **Land Dispute Case No. 22 of 1989** which she filed against the plaintiff and was heard by a Panel of Elders chaired by the area District Officer and which decided the dispute in her favour. In that case, the plaintiff called as his witnesses two elders namely Clement Karanja Mugo and Joseph Mwangi Wakaba. The aforesaid elders were also called as witnesses by the plaintiff in this matter and they were **PW2** and **PW4** respectively. When these two witnesses were cross examined by the second defendant's counsel they denied any knowledge of such a case. However, the proceedings that were produced before this court clearly showed that the two witnesses were plaintiff's witnesses in **Land Dispute Case Number 22 of 1989, Pauline Wanjiru Thuo Vs David Mutegi Njuru** and each signed the award that was made upon finalisation of the hearing.

In her cross examination by Mr. Kimatta for the plaintiff, the second defendant denied that people who had buried their dead on the parcels of land where they had settled before balloting took place were to remain on the same parcels. She said that there were three graves on her parcel of land. She said that she got the suit premises through balloting and not through any other way.

The second defendant called several witnesses who testified that they had buried their close relatives in some parcels of land on which they had initially settled on but after they balloted and were allocated their respective parcels of land, they moved out of the former settlements leaving graves of their dead people where they were. Some of the witnesses said that on their allotted portions of land they found graves which had also been abandoned by other people who had moved elsewhere. However, there were a few cases where people who were supposed to move out of a given parcel of land voluntarily exchanged with others who were supposed to move in.

The plaintiff's main contention in this suit was that the first defendant company had passed a resolution to the effect that its members who had settled on some portions of the company's land before it was sub-divided and proceeded to put up permanent houses thereon and buried their dead relatives thereat were not to be moved to any other place after sub-division and balloting but would be allocated the same parcels where they were. That contention was denied by the second defendant. It was for the plaintiff to prove what he alleged. **Section 107(1) of the Evidence Act Cap 80** states as follows:-

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist”.

The plaintiff did not discharge his burden of proof. He did not produce minutes of the meeting in which the said resolution was passed.

According to PW2, Joseph Mwangi Wakaba, one of the first directors of Kasambara Farmers Co. Ltd, members of the company who had done permanent developments or buried their loved ones in the portions where they had settled before sub-division of the farm were not going to ballot. However, that contention was shown to be false because the plaintiff himself told the court that he balloted and picked Plot No. 94. **PW3, Mwangi wa Gichimu Gachihi** testified that even people who had put up permanent houses and buried their dead in their temporary settlements also balloted and every person was supposed to move to the parcel of land as shown on the ballot paper. There was resistance by some of the members and the directors of the company and Provincial administration intervened in some cases and according to PW3, this is what brought disaffection to the members.

If the plaintiff's contention was true, then the second defendant and himself would not have balloted at all. On the other hand, if the plaintiff had picked a ballot indicating Plot No. 57 (the *“suit premises”*) he would have been very satisfied with the balloting process but because lady luck did not smile in his favour he now condemns a process which was universally accepted by all the members of the company. There was overwhelming evidence that the plaintiff's contention was not true. A few people who remained in the places where they had developed and buried their dead ones at did so either through mutual arrangement with other members whereby they swapped places or through extra judicial intervention of the company's directors and the provincial administration, as was the case in respect of **PW4, Clement Karanja Mugo**, who said that he was supposed to move to a different place but the area District Officer intervened and he remained in the original place where he had settled and buried his father.

The second defendant lawfully acquired title deed to the suit premises. She had earlier balloted and picked a ballot paper which had parcel No. 57 thereon and which was later registered as **GILGIL/KARUNGA BLOCK 1/92**. The plaintiff conceded that there was no fraud on the part of the second defendant in her acquisition of the suit premises. He alleged that the directors of the first defendant were fraudulent but he did not adduce sufficient evidence to prove the same.

While I do not agree with the second defendant's advocate that his client's title was a first registration, and this is because the whole farm initially belonged to Lord Delamere who sold it to the first defendant and was then sub-divided amongst the members of the first defendant, I am nevertheless satisfied that the registration of the second defendant as the absolute proprietor of the suit premises was beyond any reproach. The plaintiff's occupation and burial of his father thereon is not, in the circumstances of this case, an overriding interest that may be said to subsist and affect the land in any way. The fact that a person has buried a close relative on a parcel of land is not sufficient ground *per se* to entitle that person

to any right of occupation or ownership of the land if otherwise the land lawfully belongs to somebody else.

Having carefully considered the evidence adduced before this court by both parties and their respective witnesses, I find that the plaintiff's suit is incompetent because the plaintiff did not have capacity to institute the suit in 1989 as the legal representative of his late father's estate because he had not obtained any grant of representation. The amended plaint which was filed in 1997 after obtaining a Limited Grant of Letters of Administration **ad colligenda bona** (which was itself defective) cannot cure the defect which existed at the inception of the suit. Grant of representation takes effect only upon its date of issue and not earlier.

On the merits of the case, I find that the plaintiff has, on a balance of probabilities, failed to establish his claim against the defendants. I dismiss all the plaintiff's prayers as stated in his amended plaint. I hold that the second defendant is rightfully registered as the absolute proprietor of **GILGIL/KARUNGA BLOCK 1/92** measuring 8.161 hectares (and not **GILGIL/KARUNGA BLOCK 1/57-92** as indicated in the amended plaint). The plaintiff has unlawfully remained in occupation of the second defendant's property for many years and must now demolish his structures therefrom and move out completely so that the second defendant can now enjoy her property. The plaintiff's case is therefore dismissed with costs to the second defendant.

DATED, SIGNED and DELIVERED at Nakuru this 8th day of June, 2006.

D. MUSINGA

JUDGE

8/6/2006

Judgment delivered in open court in the presence of Mr. Kahiga holding brief for Mr. Karanja for the second defendant, plaintiff present in person and in the absence of Mr. Kimatta for the plaintiff.

D. MUSINGA

JUDGE

8/6/2006