



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 138 of 1991**

JOSEPH GITONGA GITHONGO PLAINTIFF

VERSUS

WAHOME MUCHURA 1ST DEFENDANT

LAND REGISTRAR, NYERI 2ND DEFENDANT

MATHIRA AGRICULTURAL CO. LTD. 3RD DEFENDANT

J U D G M E N T

Joseph Gitonga Githongo hereinafter referred to as the Plaintiff has brought this suit against Wahome Muchura, Land Registrar Nyeri and Mathira Agricultural Company Ltd. (hereinafter referred to as 1st, 2nd and 3rd Defendants respectively). By an amended plaint filed on 11th November 1994, the Plaintiff contended that he was allocated 2 acres of land by the 3rd Defendant Co. of which he was a shareholder and that the land was subsequently registered in his name as land parcel No. Kabaru/Block II/Mathira/446, (also referred to as plot No. 446) but that the 1st 2nd and 3rd Defendants later colluded and caused land parcel No. Kabaru/Block II/Mathira/446 to be registered in the name of the 1st Defendant and that the 1st Defendant has unlawfully entered into the said land and has prevented the Plaintiff from taking possession of the said land as a result of which the Plaintiff has suffered loss and damage.

The Plaintiff therefore prays for judgment against the Defendants for the following orders:

- (a) That the Defendants restore land parcel No. Kaburu/ Block II/Mathira/446 to the Plaintiff.**
- (b) That the second Defendant to cancel the registration of the said land in the name of the first Defendant and for the same to be registered in the name of the Plaintiff.**
- (c) That the first Defendant to be evicted from the said land and the Plaintiff to be put into possession of the same**
- (d) General damages**
- (e) Costs of the suit**
- (f) Interest on (d) & (e) at court rates.**

Three witnesses testified on behalf of the Plaintiff. These were the Plaintiff (P.W.1) his neighbour John Iguri Githu (P.W.2) who introduced him and facilitated his being a member of the 3rd Defendant and

James Wachihi Kingori (P.W.3) who was the first secretary and one of the Pioneers of the 3rd Defendant. Briefly the evidence for the plaintiff was as follows:

The 3rd Defendant is a land buying Co. which had land at Kiganjo. The Plaintiff through P.W.2 became a member of the Co and bought shares worth Kshs.2,100/=.

On 30th May 1981, the Plaintiff together with other members balloted for land and the Plaintiff was issued with a Balloting certificate for plot No. 446.

In July 1981, the D.C. set up a committee to investigate the affairs of the Co. The report was released on 22nd August 1981 and it contained the name of the Plaintiff as a fully paid up member who had successfully balloted for a plot. The plot was later identified to the Plaintiff by directors of the 3rd Defendant who included one Muraguri (D.W.3).

In 1987 the Plaintiff noticed a structure on the plot which he had been allocated. He reported to Muraguri who asked the person who was on the land to move but the person whom the Plaintiff identified as Wahome Muchura (1st Defendant) did not move.

In January 1989, the Plaintiff paid for his title and paid an additional 1000/= as demanded by 3rd Defendant. In February 1989, the Plaintiff received a title deed in his name for plot No. Kabaru/Block 2 Mathira/446. He sued the 1st Defendant but learnt from the defence of 1st Defendant that the 2nd Defendant had issued him with a title deed for the Plaintiff's plot. On checking with lands office he found that the Green Card reflected the 1st Defendant and not the Plaintiff as the owner of the property. The Plaintiff therefore amended his plaint and included the 2nd and 3rd Defendants as parties.

P.W.3 confirmed that P.W.2 paid 260/= on behalf of the Plaintiff for purchase of shares from the Co. and that the Plaintiff later paid more money to make a total of Kshs.3,100/= and that Plaintiff successfully balloted for land from the company.

In his defence, the 1st Defendant maintained that he has exclusive interests in Kabaru/Block II/Mathira/446. He maintained that he was allocated the same by the 3rd Defendant being the owner of a fully paid share. He maintained that he took possession of the land and has been living on it since 1986 and has been issued with a title deed to the land by the 2nd Defendant. He maintained that the Plaintiff was not a shareholder of the 3rd Defendant Co. and that if he has any title deed to the suit land the same must be a forgery.

The 2nd Defendant also filed a defence denying the Plaintiff's claim and contending that the Plaintiff has never been the owner of the suit land and any documents of title he may have, were obtained fraudulently. The 2nd Defendant further maintained that no notice to sue the Government was served as required by section 13A of the Government Proceedings Act Cap 40.

The 3rd Defendant denied that the Plaintiff is its shareholder or that it allocated plot No. 446 to the Plaintiff. The 3rd Defendant maintained that it allocated plot No. 446 to the 1st Defendant and not the Plaintiff and therefore any title deeds to the plot in the name of the Plaintiff must have been acquired through fraud.

The 1st Defendant testified that the suit land was allocated to him by the 3rd Defendant of which he was a shareholder. He testified that he paid Kshs.3,100/= for the shares. During the ballot he was allocated a plot which was very far and not suitable for cultivation. The 1st Defendant complained to the 3rd Defendant. His wife Elizabeth Nyokabi Wahome (D.W.2) took up the matter with the 3rd Defendant as 1st Defendant was unwell. D.W.2 went up to the District Commissioner and the 1st Defendant was given plot No. 446 which had earlier been given to someone who rejected it. The 1st Defendant and his wife

moved into plot No. 446 in 1986 and occupied the same.

Sometime in 1989 a dispute arose when the 1st Defendant wanted the title for the plot and was not allowed to pay for it as someone else was said to have already obtained the title. The D.O. intervened and ruled that the land belonged to the 1st Defendant.

Muraguri Jairo Macharia (D.W.3) a member and shareholder of the 3rd Defendant, testified that balloting was first done in 1981 but this was nullified when complaints arose as some shareholders including himself were omitted. A probe committee was set up and D.W.3 was appointed a member of that committee. He was later in July 1981 elected a Director of the 3rd Defendant. A new survey was done by Gatome & Associates Surveyors. The second balloting was subsequently done on 25th December 1982. He testified that the Plaintiff was a member of the 3rd Defendant but did not come for the second balloting. He testified that the 1st Defendant participated in the second ballot and was allocated plot No. 285. He however complained and was later given plot No. 446 which he took possession of in 1986.

D.W.3 testified that sometime in 1989, the Plaintiff was sent to him by the chairman of the 3rd Defendant for him to write a new card for him for plot No. 446. D.W.3 did not remember that this plot had already been allocated to the 1st Defendant. He therefore filled and signed a new card for the Plaintiff and the Plaintiff applied for the title. He maintained that it was a case of double allocation since the plot had already been allocated to the 1st Defendant. The matter was later referred to the committee and it was confirmed that plot No. 446 belonged to the 1st Defendant and not the Plaintiff.

Peter Gutu (D.W.4) a land Registrar with the Ministry of Lands and settlement currently based in Nyeri identified and produced the Green card in respect of the suit land which showed the registered owner as the 1st Defendant. He also identified a title deed in respect of the suit land issued on 5th July 1991 in the name of the 1st Defendant. He also produced the transfer document from the Government of Kenya to the 1st Defendant.

Under cross-examination he conceded that he had not produced the parcel file for the suit land. He identified a title deed for the same land issued on 2nd February 1989 in the name of the Plaintiff. He conceded that both title-deeds in the name of the Plaintiff and the 1st Defendant were signed by the land Registrar and sealed and that there was no court order canceling the Plaintiff's title deed. He conceded that the green card was cancelled and a new one issued after the D.O. advised the land Registrar that the dispute had been settled in favour of the 1st Defendant.

In his written submissions filed in court Mr. Muthoni submitted that the Plaintiff's registration in respect of the suit land was a first registration and should be protected by section 28 of the Registered Land Act. He maintained that the cancellation and alienation of the Plaintiff's proprietary rights were fraudulent and that the 2nd Defendant deliberately failed to produce the parcel file and ENE for the suit land. He urged the court to find the 1st Defendant's title tainted with illegality and give judgment in favour of the Plaintiff and issue orders as prayed.

Ms Mukuha who appeared for the 1st and 3rd Defendant also filed written submissions in which she urged the court to find the Plaintiff's case not proved as the same was based on a title-document not supported by the green card and the same was therefore invalid.

Ms Mukuha urged the court to find that the Plaintiff never participated in the second ballot after nullification of the first ballot and he was not therefore entitled to plot No. 446 which in any case had already been issued to the 1st Defendant.

She submitted that the provisions of Cap 300 were not violated as the Plaintiff was not proved to have been registered as the owner of the suit land. She submitted that the Plaintiff cannot rely on fraud when

the same was not pleaded. She therefore urged the court to dismiss the Plaintiff's suit.

A statement of agreed issues was filed jointly by the parties on 29th July 1996. The agreed issues were as follows:

1. ***Is the plaintiff a shareholder of the third defendant which allocated him a portion of land comprising of two acres or thereabouts land parcel No. Kabarú/Block II/Mathira/446 registered in the name of the plaintiff under the Registered Land Act Cap 300 Laws of Kenya on 2nd February 1989 and title deed issued accordingly?***
2. ***Did the three defendants on 5th July 1991 collude with each other after filing this suit and caused the said land parcel No. Kabarú/Block II/Mathina/446 to be registered in the name of the first defendant without taking into account the plaintiff's prior interest on the said land?***
3. ***Has the plaintiff suffered loss and damage due to the said transfer?***
4. ***Did the first defendant unlawfully entered into possession for the suit land and prevent the plaintiff from taking possession of the said land as a result of which the plaintiff has suffered loss and damage?***
5. ***Is the Plaintiff entitled to the said land to be restored by the first defendant to the plaintiff and the second Defendant to cancel the registration of the said land in the name of the first defendant and for the same to be registered in the name of the plaintiff?***
6. ***Should the first defendant be evicted from the said land?***
7. ***Is the plaintiff entitled to general damages against all the defendants for the unlawful transfer?***
8. ***Who should pay the costs of this suit?***

From the pleadings both the 1st Defendant and the 3rd Defendant denied that the Plaintiff was a member and shareholder of the 3rd Defendant.

They also denied that the Plaintiff was allocated plot No. 446 by the 3rd Defendant and maintained that if the Plaintiff has a title deed to plot No. 446 then the same was acquired fraudulently.

The evidence however discloses a departure from the pleadings. Both 1st Defendant and his wife D.W.2 testified that they did not know the Plaintiff. They were therefore not in a position to swear positively that the Plaintiff was not a member of the 3rd Defendant. No register or list of shareholders was produced. To the contrary, D.W.3 who testified on behalf of the 3rd Defendant conceded that the

Plaintiff was a member of the 3rd Defendant. I therefore find that the Plaintiff was in fact a shareholder of the 3rd Defendant Co.

It is evident that the Plaintiff was in possession of a card showing that he was qualified to have plot No. 446. While the Plaintiff testified that he received the card following his successfully balloting for a plot in 1981, D.W.3 maintained that the ballot of 1981 was nullified and that the Plaintiff did not participate in the second ballot and that D.W.3 erroneously signed the card for the Plaintiff in 1989 at the request of his chairman without realizing that plot No. 446 had already been allocated. These were however matters not pleaded in the defence. Moreover no documents were produced to prove the alleged nullification of the balloting of 1981 nor was the 3rd Defendant's chairman called to confirm the allegation that the Plaintiff was issued a card in 1989 without balloting.

It is admitted by both 1st Defendant and D.W.2 that 1st Defendant originally balloted for plot No. 285 and was later allocated plot No. 446 which had been originally allocated to one Wavori Kimithu who had moved from the plot. The 3rd Defendant did not however call this person to confirm that he was indeed the original allottee of plot No. 446.

I find that D.W.3 did not speak the truth. I find that plot No. 446 was first allocated by the 3rd Defendant to the Plaintiff who had successfully balloted for it, and this was evidenced by P Exh. 1 which was duly signed by officials of 3rd Defendant though not sealed. It is also apparent from P. Exh. 4 that a title deed was duly issued in favour of the Plaintiff on 2nd February 1989. This title deed was accepted by D.W.4 to have been duly signed by the land Registrar and duly sealed. The allegation that the document was a forgery was therefore not proven. It is evident that the registration of 1st Defendant was done on 5th July 1991 pursuant to a letter signed by the D.O. advising the land Registrar to transfer the land to the 1st Defendant (Exh. D8). The author of this letter was however not called to testify nor did the letter have any legal basis to nullify the registration of the Plaintiff as the registered proprietor of the suit land or to cancel the green card containing the transactions in respect of the Plaintiff. I find that the Plaintiff's registration as the proprietor of the suit land being a first registration the same was indefeasible.

Section 143 of the Registered Land Act states as follows:

143(1) subject to subsection (2) of this section the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (emphasis added).

In this case the Plaintiff's registration was not only a first registration but also no fraud or mistake was proved and therefore the land Registrar had no right to interfere with the registration.

It is evident that the 2nd Defendant had the suit land registered in the name of the 1st Defendant in violation of the Plaintiff's proprietary rights. The Plaintiff suffered loss and damage as a result of the violation of his rights. It is evident that the 1st Defendant was misled by the 3rd Defendant into taking possession of the suit land as a result of which the Plaintiff was denied use of his land. I find that the transfer and registration of the land in favour of the 1st Defendant was illegal. I therefore give judgment in favour of the Plaintiff as against the 1st, 2nd and 3rd Defendant and grant prayers Nos. (a), (b) & (c).

The court was not addressed on the issued of quantum in respect of general damages. I have no doubt however that the Plaintiff suffered loss as a result of his inability to take possession of the suit land for a period of about 15 years from the time he obtained his title and requested the 1st Defendant to vacate the land. I would award the Plaintiff a modest sum of Kshs.200,000/= (Two hundred thousand) as general damages as against the 3rd Defendant who is the one who caused the confusion.

I also award the Plaintiff costs of this suit as against the 2nd and 3rd Defendant together with interest at court rates from the date of filing suit.

Those shall be the orders of this court.

Dated signed and delivered this 20th day of September 2005

H. M. OKWENGU

JUDGE