



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 101 OF 2002

SAMUEL PETER GITAU KARANJA.....APPLICANT

-VERSUS-

HANNAH NJERI MUGI.....RESPONDENT

(Sued as the administratrix of the estate of **JOSEPH KIMUHU GATHENGERE**)

JUDGMENT

1. BACKGROUND

This case was first filed at the Principle Magistrate's Court at Nakuru as PMCC No. 35 of 1988. It was then transferred to the High Court by a Court Order and registered under HCCC NO. 101 of 2002.

2. The dispute is over the ownership of a **Plot No.71 within Kiamunyi Farmers Company Limited**, claimed by both the plaintiff and the defendant. It is a very old case having been filed in 1988.

The plaintiff's case was heard before Hon. Muga Apondi Judge, (retired) and Hon. Hellen Omondi, Judge before whom Defence witness (DW1) also testified. I heard evidence of **DW2** and counsel submissions.

3. This is a land case that was parheard by 2012 when the Environment and Land Court was established by an Act of Parliament No.19 of 2011 to hear all disputes arising from Title, Ownership, Use and Occupation of Land.

4. **By Gazette Notice No. 5178 of July 2014, the Hon. The Chief Justice by Practice Directions** directed that all pending parheard cases before the High Court continue to be heard and determined by the High Court. It is upon such directions that as a High Court Judge I continued to hear this case. I am therefore clothed with the requisite jurisdiction to hear and determine the case.

5. THE PLEADINGS

By a plaint filed on 18th January 1988, Amended on the 10th March 2008 and filed on the 12th March 2008, the plaintiff stated that being a fully paid up member of Kiamunyi Farmers Company Limited he was allocated the subject Plot No.71 in 1971, was using the same by ploughing and planting when the **defendant Joseph Kimuhu Gathengere** (deceased) but substituted by his wife, **Hannah Njeri Mugi** vide **Nakuru Succession Cause No.122 of 2006**, without any colour of right or authority trespassed thereon started farming and fencing thus prevented the plaintiff from further development of the plot, that the defendant is in possession and use of the plot since then.

6. The plaintiff therefore seeks **general damages for loss of user of the farm and Kshs.1,500/= special damages, together with:**

(a) A declaration that the plaintiff is the legal allottee and owner of Plot No.71 Kiamunyi Farmers Company Limited and that the defendant is a trespasser.

(b) A permanent injunction restraining the defendant by himself, his agents or servants from entering or interfering with the plaintiffs quiet possession of the plot.

(c) General damages and costs of the suit.

7. In his defence dated 6th February 1988, the defendant denied the plaintiff's claim of ownership claim of the suit plot and stated that the subject plot was originally allocated to one **Michael Waweru** in 1975 who sold it to him in 1982 that the company had not bought the farm in 1971 and so could not have allocated the plot to the plaintiff in 1971.

He therefore contended that he was a *bonafide* purchaser for value and has cultivated the plot since 1981 with full knowledge of the plaintiff; and therefore is not a trespasser. He sought dismissal of the suit with costs.

8. ISSUES FOR DETERMINATION

(a) *Who was the legal allottee of Plot No.71 within Kiamunyeki Farmers Company Limited?*

(b) *Whether the defendant is a trespasser in the subject plot.*

(c) *Whether the plaintiff is entitled to the reliefs sought in the plaint.*

9. PLAINTIFF'S CASE

The plaintiff called three witnesses.

PW1 was the plaintiff, Samuel Peter Gitau. He testified that Plot No.71 is now registered as **Dundori/Lanet/5/71'A'**, 2½ Acres, that the plot was bought by his father on his behalf and produced the following documents as exhibits.

Entrance fees receipt - Ext 1, Share capital receipt -Ext 2, Share capital receipt 4, Ballot paper -Ext 5.

He testified that demarcation of the land was done in 1975 but some plots were left unallocated, among them Plot No.71, that he was then allocated and or sold to him.

10. That in 1981 a Probe Committee was set up to investigate misappropriation of funds and the plots by the directors, that he did not move into the plot immediately upto 1987 when he moved in to plough but the defendant laid his ownership claim and prevented him from entering therein and the defendant has since been in occupation ploughing and planting maize.

11. It was his evidence that the dispute was heard by the District Officer (D.O.) Bahati who ruled in his favour, but the award was not adopted by the court – **Exh 8**, and further that another probe committee set up in 1988 ruled that the suit plot belonged to the Defendant – **Ext 9** and that in the 1987 Committee Michael Waweru who is alleged to have sold the plot to the defendant was sitting as a member of the committee and therefore was an interested party and producing Michael Waweru's affidavit – **Ext 10**, the said Michael Waweru stated that he had lost all original receipts for the land but failed to state that he was allocated the plot in 1977 but had sold plot to the defendant.

12. The plaintiff averred that upon balloting for the plot, he acquired a Title Deed to the Plot on 18th July 1997 – **Ext 12** – certificate of search.

He also stated that his father Evanson Karanja Kiriongi was a director of the Company from 1972 to 1975. Shown an **Agreement (DMFI-1)** between Michael Waweru and Githua, dated 18th April 1977, PW1 stated that by that time he had no claim over the land.

He confirmed that his share certificate dated 24th January 1985 was signed by a Managing Director as well as on the share certificate for Michael Waweru though handwritten, while his was typed: He confirmed that his father was also a member of the probe committee that sold the plot to him.

13. **PW2 WAS MATHEW KINGORI GITAHI**, who was a member of the 1981 Probe Committee. He testified that Plot No. 71 was not allocated to anyone nor purchased by anyone, nor did it belong to Michael Waweru, so the Committee sold the plot to the plaintiff in 1982. His evidence was that the plot under dispute belongs to Samuel Peter Gitau, the plaintiff.

Upon cross examination, **PW2** testified that Kiamunyeki land was bought in 1973, subdivided in 1975 and balloting of the plots done in 1975, and that the plaintiff came to own the plot in 1982 after the probe and the share certificate to him was issued in 1982 together with a ballot paper, during which time the company was selling plots, not shares. He reiterated that the subject plot belonged to he plaintiff.

14. The plaintiff's case was closed, and the defendant who had died was substituted with **Hannah Njeri Mugi** being the **administratrix of the deceased(defendant)** estate by an order of the court dated the 4th December 2007.

15. DEFENDANT'S CASE

Hannah Njeri Kimuhu testified as **DW1**.

Her evidence was that her late husband bought the suit Plot No.71 from **Michael Njenga Waweru**, and she started cultivating thereon in 1981, to date. She produced a **Sale Agreement – DExt 7** entered into on 11th February 1982 and that she was present during the sale.

In cross examination, **DW1** stated that they rented the plot rented two years before the sale, and the purchase price was Kshs.35,000/=which they paid in terms of the sale agreement. She denied knowledge that as at 20th November 1982 the plot had been repossessed. She did not know where Michael Waweru got the plot from but only that she was present when they brought it from him, by a Sale Agreement dated 11th February 1982.

16. DW2 WAS JOSEPH GAITHO MWAURA

He was one of the founder directors of Kiamunyeki Company in 1971, that between 1974–1975, the company bought the farm and subdivided its to shareholders. It was his testimony that Plot No.71 was balloted by Michael Waweru a former Chairman, (deceased) – with share certificated No.687 dated 2nd February 1977, and later sold and transferred to the Defendant Kimuhu Gathengere, now deceased, in (1982).

He denied knowledge of how the plaintiff got the plot in 1971 yet the company was not in existence as it was incorporated in 1973.

It was his evidence that in 1977 no Titles were being issued due to court cases and stated that the plaintiff must have registered the plot in his favour fraudulently.

17. On cross examination, **DW2** stated that he was a director from 1973 upto 2001, and that himself and 2 others signed Michael Waweru's share certificate – **DExt1** - on the 2nd February 1977, and endorsed the Defendant's (deceased) name thereon – who had bought the plot from Michael Waweru vide an agreement of sale that was stated in the company registers. Shown the share certificate (**DExt 1**) issued to Michael Waweru, he confirmed having signed as a director at the back, and stated his knowledge that the defendant bought the plot hence the endorsement of the defendants names on the share certificate.

18. DW3 WAS DAVASON KAROMO GICHUKI

He recorded his statement and his testimony was that he was a member of the Board of Directors of the company from 2001 and owner of plot No. 130B having a share certificate issued in 1977. Shown **DExt 1** – share certificate- to **Michael Waweru**, his evidence was that the certificate was signed on 2nd February 1977 for Plot No.71 to Michael Waweru but later was sold to Joseph Kimuhu Githengere. He confirmed that Githengere paid Kshs.3,000/= to the company.

Shown **DExt 4 – Share Certificate to the Plaintiff** dated 24th January 1985, he stated that it was not genuine as at that time the company was not selling shares but plots and that the last shares were sold in 1973 and balloting done in 1975.

On **DEX I** - share certificate to Michael Waweru, **DW3** clarified that at the back it was written verified as correct on 5th January 1988 and has the Chief's stamp. His evidence was that Plot No.71 belongs to the defendant, having bought it from Michael Waweru the original allottee by the company.

Shown PExt 9 –1981 Probe Committee Report Resolutions, this witness testified that Plot No.71 was found to belong to the defendant.

19. On the Title to the plot issued on 18th July 1997 to the plaintiff, the witness termed it as illegal stating that it was issued to a non-member and that the court directed cancellation and that authority to issue Titles to the plots were given to the Land Registrar on 16th February 2012 and before then, no titles were being issued at the time, the same having been stopped in case No. HCCC No. 33 of 1998 at Nakuru.

20. Upon closure of the case, counsel to the parties filed written submissions after which they highlighted them.

21. **Applicable legal and constitutional provisions and principles**

(a) **Registered Land Act Cap 300** (now repealed) under which the suit property was transferred and registered in the plaintiff's names.

Section 143 (1) and (2)

(1) That the court may order rectification of the Register if it is satisfied that the title was obtained through fraud, misrepresentation or mistake.

(2) That the Register shall not be so rectified as to affect the title of a proprietor who is in occupation and possession, having acquired the land lease or charge for valuable consideration unless such proprietor had knowledge of the omission, fraud, mistake or caused such omission, fraud mistake or substantially contributed to it by his own act, neglect or default.

Section 30 – unless the contrary is expressed in the register, all registered land shall be subject to overriding interests as may be endorsed on the register and those that may subsist without their being noted on the register. See

Epaphrus Muturi Kigoro -vs- William Mukui Nyaga (C.A at Nyeri) A. Visram, Martha Koome, J. Otieno Odek JJA).

(b) **Article 40(1) and (2) of the Kenya Constitution 2010**

- Protection of rights to property to any individual and not to arbitrarily deprive a person property of any description or interest or to limit in anyway the enjoyment of any right but subject to provisions of **Article 40(3) (a), (b)**. See **Eunice Grace Njambi Kamau -Vs – AG & 5 Others (2013) e KLR.**

(c) **Land Registration Act, 2012.**

Section 24, 25, 26, 27, 28 and 80

- That a Certificate of Title held by a proprietor shall be taken by all courts as *prima facie* evidence of proprietorship, is absolute but subject to encumbrances, easements and restrictions endorsed in the certificate, and the title shall not be challenged unless on grounds of
- fraud, misrepresentation or acquisition of the title illegally, unprocedurally or through a corrupt scheme.

Section 80 – that the court has power to order cancellation or amendment of a title and order rectification of the register if it is satisfied that registration was obtained fraudulently or through a corrupt scheme.

See -

- **Funzi Island Dev. Co. Ltd & 2 Others -vs- County Council of Kwale & 2 Others (2014) e KLR.(Maraga C.J).**
- **David Kiptugen -vs- Commissioner of Lands 2015) e KLR (Munyao J).**
- **Moses Njaraba Kamau -vs- Mary Muthoni Njaraba & 3 Others(2017) e KLR (J. Mulwa J).**
- **ELC No.51 of 2014 (O.S) Alice Chemutai -vs- Nickson Kipkurui & 2 Others (2015) e KLR.**

(d) Parties are bound by their pleadings- Oder 2 of the Civil Procedure Rules

- **IEBC and Another -vs- Stephen Mutinda & 3 Others (2014) e KLR C.A No. 219 of 2013.**
- **Supreme Court Presidential Election Petition No.1 of 2017.**

Raila Amolo Odinga & 2 Others -vs- IEBC & 3 Others (2017) e KLR.

It is trite and a principal of law that parties are bound by their pleadings and that any evidence that does not support the pleadings or at variance with the same must be disregarded.

(e) Doctrines of Equity and Natural Justice

That the court is a court of law, and equity shall not suffer no wrong without a remedy, that a man shall not benefit from his own wrong doing, that equity detests unjust enrichment -

See

- **Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Karigi CA No.6, 26 and 27 (consolidated) of 2011.**
- **Onyango -vs- AG (1986 1989) EA 452 (CAK)**

The above cited authorities are not exhaustive.

22. ANALYSIS OF EVIDENCE SUBMISSIONS AND FINDINGS

ISSUE NO. 1

Who was the legal allottee and owner of the suit Plot No.71 (Dundori/Lanet/5/71'A')within Kiamunyeki Farmers Company Limited?

The genesis of the Kiamunyeki Farmers Company Limited was well stated by **DW2 Joseph Gaitho Mwangi** who was one of the founder Members and Director of the company in 1971 when the farm was bought and company incorporated in 1973 and in 1974, subdivided it to its share holders, among them one Michael Waweru. According to the company shareholders and title registers Plot No. 71 was allocated to Michael Waweru in 1977 under Share Certificate No.687 dated 2nd February 1977. This was collaborated by **DW3 Davanson Karomo Gichuhi** who took over directorship from 2001. He stated that he confirmed from the company registers that the original allottee of the Plot was Michael Waweru who subsequently sold it to the Defendant (now deceased) and substituted by his wife (**DW1**) vide Agreement dated 11th February 1982.

It was his testimony that the subsequent repossession and reallocation of the suit plot with 58 others by the Nakuru Land Registrar in 1997 and re allocation to the plaintiff was fraudulently done as the plot was never vacant or unallocated.

23. I have noted the plaintiff's pleadings in his **Amended plaint filed on the 12th March 2008** and his statements that he was allotted the subject plot since 1971 (paragraph 3) and that the defendant trespassed thereon in 1987 and planted the entire farm and has since been in occupation and possession farming on the same. This is in complete contrast to the plaintiff's evidence in chief, and cross examination as well as in his submissions by his advocate that the plaintiff was allocated the Plot No.71 by purchase from the Nakuru Kiamunyeki Company Limited and issued a Share Certificate on 24th January 1985, and not from Kiamunyeki Farmers Company Limited, from which the plaintiff seeks reliefs and declarations.

24. I have also looked at the payments of entrance fees receipts dated 20th November 1981, 21st February 1982 and share certificate fees PExt 1, 2, 3, 4 and ballot paper No.041 – PExt 5. The plaintiff testified that he did not ballot. The share certificate produced by the plaintiff is No.041 dated 24th January 1985 while the share certificate issued to Michael Waweru No. 150 is No. 687 and was issued to him on the 2nd February 1977. On it is endorsed the name J. Kimuhu Githengere the defendant and stamped by the company stamp (DExt 1).

25. It is evident that there was double allocation of the same plot by the company either by fraud or Mistake or misrepresentation. The share certificate issued to the plaintiff was done long after the earlier one to Michael Waweru who sold the plot to the defendant in 1982 before the alleged allocation to the plaintiff and without notice. The fact of sale of the plot to the Defendant by Michael Waweru to the Defendant was seriously not contested. I note that the company was not made a party to the case, which in my considered opinion was a grave omission as the issue of ownership by allotment of the plot before the title was registered in the plaintiff's name is at the centre of this dispute. No explanation was adduced as to why the plaintiff did not call the directors of the company to produce the company registers of shareholders and Titles and other documents. It is also evident that the plaintiff could not have been allocated the subject Plot in 1971 as his documents, including the alleged payments to the company as well as his share certificate and ballot paper all read 1985.

26. It is trite that a party is bound by its pleadings and a court cannot be called upon to make a decision on unpleaded issues or issues that are pleaded but not supported by evidence – **Order 2 rule 6 of Civil Procedure Rules,- IEBC & Another -vs- Stephen Mutinda, and Supreme Court Presidential Election No. 1 of 2017 – Supra.**

It has also been submitted that the plaintiffs share certificate and payment receipts (PExt 1-5) were issued by **Nakuru Kiamunyeki Company Limited** whereas the declarations and reliefs sought by the plaintiff are directed to a different legal entity, namely **Kiamunyeki Farmers Company Limited**. I have seen no further amendments to the amended plaint to explain the relationship if any, of the two companies nor to the identity of the suit Plot No.71, that the said plot, upon survey was given **Parcel No. Dundori/Lanet 5/71'A'**, and that no evidence was lead that this is one and the same Plot No.71, the subject plot under dispute, yet that remedy is available under **Order 2 of the Civil Procedure Rules**.

27. The plaintiff did not clear the air to the court's satisfaction whether the subject Plot No.71 within Kiamunyeki Farmers Company Limited as stated in the plaint is one and the same Plot No.71 within Nakuru Kiamunyeki Company Limited, as appears in all the plaintiffs exhibits and the share certificate including payment receipts, and upon which the title Dundori/Lanet Block 5/71(Kiamunyi 'A') is said to have been issued. The said title was not produced in court for its perusal as to satisfy itself of its original owners. Further no documents or evidence were adduced by the plaintiff that the two companies Nakuru Kiamunyeki Company Limited and Kiamunyeki Farmers Company Limited are one and the same or have a legal relationship or that any change of name was affected, or otherwise.

28. In the circumstances, the court finds that the two companies, Nakuru Kiamunyeki Company Limited and Kiamunyeki Farmers Company Limited are two distinct and separate legal entities, and that the plaintiff failed to satisfy the court of their relationship, if any.

29. I have considered the two Probe Committees report – **PExt 9** that were set up and their mandates. In the 1981 Probe Committee the plaintiff's father set as a member and thus resulted in a report in favour of the plaintiff while in the 1987 Probe Committee, Michael Waweru set as a member and the report was in his favour. It is trite that one cannot sit in his case as the Judge Jury and executioner as is against the Rules of Natural Justice. See **Abbot -vs- Sullivan (1952) I KB 189, Onyango Oloo -vs- AG (1986-1989) EA 456**.

30. I have looked at the mandate of the Probe Committees as stated in the reports (**Ext9**). They did not include repossession and reallocation or sale of the plots. Their mandate was to investigate irregular allocation and grabbing of plots and misuse of company finances by the directors and Debts which affected the operation of the company-**PW2's** evidence. The 1981 Committee actions in repossession of plots and reallocation and sale, including to the plaintiff, was *ultravires* its mandate.

It is therefore save to ignore the 1981 Committees actions in repossession and reallocation or sale of the subject plot from the original allottee Michael Waweru and uphold the 2nd committee findings that Plot No.71 was properly allocated to Michael Waweru who then sold it to the defendant, despite his having set in the said committee. The Share certificate speaks to this.

31. Having come to the above findings, I fully agree with the defendant's submissions and evidence that she is the rightful and legal allottee of Plot No. 71 her late husband Joseph Kimuhu Gathengere having bought it from Michael Waweru the original allottee in 1982 and has since been in possession and has remained therein to date- **Section 143 (1) (2) Cap 300 (now repealed) and Article 40 of the Constitution of Kenya, and Section 80 of LRA 2012. - Epaphrus Muturi Kigoro case above.**

32. The court being a court of justice and equity will not allow a party to benefit from a wrong, through a corrupt scheme where he is a party. The court will at all times uphold fair administrative actions and will not shy away from pronouncing itself thus when it is clear that a litigant is bent to enrich itself unjustly. - **Macharia Mwangi Maina & 87 Others -vs Davidson Mwangi Karigi Civil Appl. No.6, 26, and 27 (Consolidated) of 2011 & Onyango -vs- AG(Supra).**

33. Under **Section 80 of the Land Registration Act 2012**, the court is empowered to order cancellation or amendments to a Title and Order rectification of the register if it is satisfied that the registration was obtained fraudulently or through a corrupt scheme – See also **Funzi Island Dev. Co. Ltd & 2 Others -vs- County Council of Kwale (2014) e KLR** and **Moses Njaraba Kamau -vs- Mary Muthoni Njaraba & 3 Others (2017) e KLR** among others.

34. **Article 40 Kenya Constitution** emphasizes the rights of property to any individual and protection from arbitrary deprivation of any description in any way including the right to enjoyment and use of the property.

To that extent, unless the court finds a person to be wrongfully in occupation and use and thus a trespasser, that right must be protected. The defendant cannot be declared to be a trespasser in Plot No. 71, having acquired the said plot through a *bonafide* purchase for value from the original allottee, Michael Waweru and therefore the legal owner of the said plot.

35. **ISSUE NO. 2**

Whether the defendant is a trespasser on the subject Plot No. 71.

The issue has been adequately addressed within issue No.1 The court finds that the Defendant is not a trespasser in the suit plot having acquired the same as a *bonafide* purchaser for value from the original allottee of the plot from the company Michael Waweru.

The defendant has every right therefore to remain in occupation, use and enjoy the rights appertenant thereto as the legal owner of the suit plot.

36. **ISSUE NO. 3**

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff's entitlement to the plot, including registration and acquisition of the Title thereof, being **Dundori/Lanet/5/71'A'**, having been acquired fraudulently through a corrupt scheme cannot avail him the declarations he seeks in his Amended plaint.

To order that he is the rightful owner would be against **Article 40 of the 2010 Kenya Constitution** as it has emerged clearly that the plaintiff seeks to arbitrarily deprive the defendant of her rights over the plot as the rightful and legal owner.

See **Macharia Mwangi Maina & 87 Others (Supra)**.

37. In **ELC case No 787 of 2012 Daudi Kiptugen -vs- Commissioner of Lands & 4 Others (2015) e KLR**, a plot was allocated to two parties through forged documents and fraudulently. The court held that the first allottee was protected under **Article 40 of the Constitution** and that irregular allocation and registration was liable for cancellation as mandated under **Section 26 of the Land Registration Act 2012** to the effect that such irregular activities cannot be protected under **Article 40 of Constitution**.

38. **Section 80 Land Registration Act 2012** empowers the court to order cancellation of a title and rectification in favour of the rightful party, but subject to the pleadings.

It is also my findings that where two parties are allocated the same plot by the allotting authority, in this case the company, the first one to be so allocated ought to be declared the lawful allottee, if no fraud is involved, with the other at liberty to seek relief from the allotting authority by way of compensation so long as no fraud or corruption are found in the second allocation between the party and the allotting authority.

39. Equity dictates that first time prevails so that in double allocations, the first time allocation carries the day – See

Funzi Island Development Company Limited and 2 Others -vs- County Council of Kwale (Supra), and **David Kiptugen -vs- Commissioner of Lands (2015) e KLR**

ELC No.51 of 2014(O.S.) Alice Chemutai -vs- Nickson Kipkurui & 2 Others (Supra).

40. For reasons stated in the body of this judgment, the court finds that the plaintiff is NOT entitled to the prayers sought in the Amended Plaint. An order of permanent injunction to restrain the defendant from entering, interfering, use, occupation and possession of Plot No.71 subject of this suit, cannot be granted to the plaintiff for the reasons stated that she is not a trespasser.

41. The defendant has been in possession and use of the suit plot since 1981 to date. Her rights thereon are thus protected under the law and the Constitution as she is not a trespasser but the legal owner, albeit without a title to the property. The prayer for general damages for trespass cannot be available to the plaintiff for reasons stated, so is the prayer for special damages.

42. The court notes that the title to the suit plot was processed in favour of the plaintiff during the pendency of this suit in 1997. To say the least that was dishonest and done in bad faith.

Had the defendant sought for an order of cancellation and rectification of the Title to the suit Plot No.71, I would not have hesitated to grant such order. I am however reminded that I am bound by the parties pleadings. **Order 2 of the Civil Procedure Rules**. -See **IEBC & Another -vs- Stephen Mutinda & 3 Others (Supra)** and **Supreme Court Presidential Election Petition No. 1 of 2017 (Supra)**.

43. Consequently, I find that the plaintiff has failed to prove his case to the required standards, upon a balance of probabilities. I proceed to dismiss the case with costs to the defendant.

Dated, signed and delivered this 15th Day of May 2018.

J.N. MULWA

JUDGE