



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 87 OF 2012**

**KYALO TUTA (*Suing as the legal representative of the***

***Estate of WANZA TUTA – (deceased)*.....PLAINTIFF**

**VERSUS**

**TITUS WAMBA NGOLOMA.....1<sup>ST</sup> DEFENDANT**

**DOMINIC MUTUNE NTHENGE.....2<sup>ND</sup> DEFENDANT**

**MWEA FARMERS CO. LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the Plaintiff dated 20<sup>th</sup> March, 2012, the Plaintiff (*deceased*) averred that on 16<sup>th</sup> July, 1984, she bought shares in the 3<sup>rd</sup> Defendant's company worth Kshs. 3,000; that the said shares entitled her to land measuring 30 acres and that she was issued with a Letter of Allotment for plot number 372 on 10<sup>th</sup> January, 1984.
2. The Plaintiff (*deceased*) averred that she was registered as member number 360 on 31<sup>st</sup> December, 1984 and that the register erroneously showed that she had paid Kshs. 304 which entitled her to only 3.04 acres.
3. According to the Plaintiff (*deceased*) when she complained about the anomaly, the 3<sup>rd</sup> Defendant resolved the issue on 16<sup>th</sup> August, 1994 by issuing her plot number 370, measuring 22½ acres; that the 1<sup>st</sup> Defendant was elected as a Secretary of the 3<sup>rd</sup> Defendant in the year 2006 when he stopped the issuance of the Title Deeds and that in the year 2009, the 1<sup>st</sup> Defendant sought to evict the Plaintiff (*deceased*) claiming he had obtained a Title Deed for the same land registered as Ndithini/Mananja Block 1/285 (*formerly plot number 370*).
4. The Plaintiff averred that as a result of the Defendants' illegal and fraudulent activities, she stands to lose her plot number 370 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff prayed for a declaration that she is the rightful owner of plot number 370 situate at Mwea Farmers Company Limited otherwise known as Ndithini/Mananja Block 1/285 (*the suit property*).
5. In their Defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that by a Letter of Allotment number 147 issued by the 3<sup>rd</sup> Defendant dated 6<sup>th</sup> May, 1989, they were jointly issued with a Letter of Allotment for plot number 370; that they accepted the offer on 15<sup>th</sup> August, 1989; that the Plaintiff was allocated Plot Number 372 and not 370 and that it is the Plaintiff who fraudulently attempted to acquire the suit property.
6. In its Defence, the 3<sup>rd</sup> Defendant stated that the Plaintiff paid Kshs.304 and was entitled to land measuring 3.04 acres; that the payment of Kshs. 3,000 was for survey fees; that the letter dated 16<sup>th</sup> August, 1984 was a forgery belatedly made to defraud the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the suit property and that as early as the 27<sup>th</sup> July, 1969, the 2<sup>nd</sup> Defendant, who was previously known by his nickname Kingesi Kitanga, started making payments towards the purchase of Mananja Farm way before the incorporation of the 3<sup>rd</sup> Defendant.
7. The 3<sup>rd</sup> Defendant averred in the Defence that after incorporation of the 3<sup>rd</sup> Defendant, the payments made by the 2<sup>nd</sup> Defendant were converted into shares; that Kingesi Kitanga is one and the same person as the 2<sup>nd</sup> Defendant and that in 1989, the 2<sup>nd</sup> Defendant sold some of his shares to the 1<sup>st</sup> Defendant thus becoming joint shares of plot number 370.
8. The 3<sup>rd</sup> Defendant finally averred that the Plaintiff was correctly issued with a Letter of Allotment for plot number 372 on which she resides up to date and that the suit property belongs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**The Plaintiff's case:**

9. The Plaintiff, PW1, informed the court that he is the son of the original Plaintiff, Wanza Tuta (*deceased*); that he was born in 1967 and that on 16<sup>th</sup> July, 1984, the deceased bought shares worth Kshs. 3,000 in the 3<sup>rd</sup> Defendant's Company.
10. According to PW1, one share was valued at Kshs. 2,250 which was equivalent of 22½ acres; that her late mother was entitled to 30 acres of the land from the 3<sup>rd</sup> Defendant and that they have occupied the land allocated to the deceased since the year 1984 to date.
11. According to PW1, in 1985, the deceased was issued with a Letter of Allotment for plot number 372; that the records erroneously indicated that she had paid Kshs. 304 and was only entitled to 3.04 acres and that she was entered in the register as member number 360 on 31<sup>st</sup> December, 1984.
12. PW1 stated that when the deceased lodged a complaint with the 3<sup>rd</sup> Defendant, she was informed that the error on the acreage of land would be rectified; that on 14<sup>th</sup> August, 1994, the Company corrected the error by issuing another Letter of Allotment dated 16<sup>th</sup> August, 1994 for plot number 370 and that that is the same land that the deceased has settled on since the year 1984.
13. It was the evidence of PW1 that it was not until 2<sup>nd</sup> March, 2011 that the deceased received a letter from the 3<sup>rd</sup> Defendant demanding that she vacates parcel of land number 370; that the 1<sup>st</sup> Defendant is the 3<sup>rd</sup> Defendant's Secretary and that it is the said Secretary who is defrauding the deceased out of her land.
14. PW1 produced in evidence the receipts evidencing the payments her late mother paid; the register showing her late mother was member number 360; the subsequent registers and several letters. PW1 also produced in evidence several maps in respect to the suit property. It was the evidence of PW1 that parcel number 284 was previously plot number 370 and that although the current Registered Index Map shows that parcels number 284 and 285 were adjacent to each other, it is different from the initial sub-division plan.
15. It was the evidence of PW1 that he has always lived on plot number 370 and that after registration, the land became Block 1/285 while plot number 372 became Block 1/284. It was the evidence of PW1 that these plots were separated by a road during the initial sub-division and that the Registered Index Map is misleading. It was the evidence of PW1 that the 1<sup>st</sup> Defendant fraudulently acquired a Title Deed for parcel number Block 1/285.
16. In cross-examination, PW1 stated that the Kshs. 3,000 that his mother paid was for the purchase of the land and not the survey fees; that every acre of land was Kshs.100 and that he is claiming for 22½ acres because that is the land she was allocated.
17. PW1 denied that his late mother bought the land she is claiming from one Joseph; that Joseph has another different piece of land; that the 1985 register shows that plot number 370 was issued to the 1<sup>st</sup> Defendant and that the 1994 Register shows his late mother is the owner of plot number 370.
18. The former Secretary of the 3<sup>rd</sup> Defendant, PW2, informed the court that in 1989, the Plaintiff's late mother, Wanza Tuta, was issued with a Letter of Allotment which showed that she had been allotted plot number 372; that the reference to plot number 372 was erroneous and that the anomaly was rectified and a Letter of Allotment for plot number 370 was issued to her in 1994.
19. It was the evidence of PW2 that as per the authentic plot allocation record dated 30<sup>th</sup> June, 1993, the deceased is reflected as member number 295 and owner of plot number 370; that plot number 372 is reflected as being amongst the plots that were available for balloting and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were shown as people who were to ballot for their land.
20. PW2 stated that the register showing that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are members number 295 with plot number 370 is a forgery; that as per the sub-division map prepared by the 3<sup>rd</sup> Defendant, plot number 372 is separated from plot number 370 by an access road and that it is not possible that the late Wanza was allocated plot number 372 which became parcel number 284 after registration. According to PW2, the register produced as PEXB 6(a) is the genuine record of the 3<sup>rd</sup> Defendant while PEXB 6(b) is the forged record.
21. In cross-examination, PW2 stated that he has been an official of the 3<sup>rd</sup> Defendant since the year 2004 to date; that he was not an official of the 3<sup>rd</sup> Defendant in 1994; that from the documents, the late Wanza is entitled to 30 acres and that a receipt is usually given when someone buys land and a separate receipt is given for survey fees. According to PW2, the anomaly on Wanza's receipt showing that she had paid Kshs. 3,000 as survey fees was corrected and that one cannot pay survey fees before paying for the land.
22. PW3 stated that he was allocated land and a Title Deed by the 3<sup>rd</sup> Defendant; that he is living on the land he was allocated and that the late Wanza has always lived on the suit land. According to PW3, the late Wanza found him already occupying his land and that she was allocated plot number 370.

**The Defence Case:**

23. The 1<sup>st</sup> Defendant, DW1, stated that he was elected as the Secretary of the 3<sup>rd</sup> Defendant in the year 2006; that he knew the late Wanza who is a shareholder of plot number 372 together with one Joseph Mbithi and that after sharing out the plot, Mbithi got plot number 369 while Wanza got plot number 372 which became parcel number 284.
24. It was the evidence of DW1 that he was allocated plot number 370 which became parcel number Mananja Block 1/285 and that he owns

the said land jointly with the 2<sup>nd</sup> Defendant. DW1 stated that the issue of double allocation of plots arose during the Chairmanship of David Ng'ang'a; that the issue was discussed and all double allocations were nullified by the 3<sup>rd</sup> Defendant and that the said Ng'ang'a was the Secretary of the 3<sup>rd</sup> Defendant between the years 1977-2004.

25. DW1 stated that Ng'ang'a was imprisoned for six (6) months due to the fraud he had committed and that even after being released from prison, he continued defrauding the 3<sup>rd</sup> Defendant's shareholders. DW1 stated that the Plaintiff's mother only paid Kshs. 304 for the land and that she was only entitled to 3.04 acres.

26. According to the 1<sup>st</sup> Defendant, the Plaintiff's mother was allocated plot number 372 by way of allotment on 10<sup>th</sup> January, 1989; that her plot is plot number 372 measuring 3.04 acres and that she has been residing on plot number 372 since 1987.

27. In cross-examination, DW1 stated that the letter dated 1<sup>st</sup> September, 1984 is a forgery; that the Land Registrar requested for a genuine register from the 3<sup>rd</sup> Defendant in 1998, which register was supplied and that the two lists were submitted, one by Mr. Ng'ang'a and the other one by the then Chairman. According to DW1, he bought 10 acres from the 2<sup>nd</sup> Defendant in 1987 and that the 2<sup>nd</sup> Defendant bought the land from the 3<sup>rd</sup> Defendant in 1968 under the name of Kingesi Kitanga.

28. The 2<sup>nd</sup> Defendant stated that he used to be known as Kingesi Kitanga; that he was a member of the 3<sup>rd</sup> Defendant and that he sold half of his land to the 1<sup>st</sup> Defendant to pay school fees for his children. It was the evidence of DW2 that the Title Deed for plot number 370 came out in the name of the 1<sup>st</sup> Defendant and in his name. In cross-examination, DW2 stated that he was paid Kshs. 100,000 for the land he sold to the 1<sup>st</sup> Defendant and not Kshs. 550,000 as stated by the 1<sup>st</sup> Defendant.

29. The Chairman of the 3<sup>rd</sup> Defendant, DW3, stated that he was elected in office in the year 2006; that he had been a member of the 3<sup>rd</sup> Defendant since the year 1970 and that the Plaintiff's late mother, Wanza Tuta, became a member of the 3<sup>rd</sup> Defendant in 1984.

30. It was the evidence of DW3 that according to the register, the Plaintiff bought plot number 372 after paying Kshs. 304 which entitled her to 3.04 acres. DW3 stated that the Kshs. 3,000 that the late Wanza paid was the survey fees and not for the land and that the former Secretary Mr. Ng'ang'a used to interfere with the register.

#### **Submissions:**

31. The Plaintiff's advocate submitted that the registration of the 1<sup>st</sup> Defendant as the proprietor of plot number 370 is being challenged by the Plaintiff. Counsel submitted that although the 1<sup>st</sup> Defendant testified that he purchased a portion of plot 370 from the 2<sup>nd</sup> Defendant for Kshs. 550,000, the 2<sup>nd</sup> Defendant denied having been paid the said amount.

32. Counsel submitted that it is not believable that the 3<sup>rd</sup> Defendant could have allowed the 2<sup>nd</sup> Defendant to be registered as a member using a fictitious name, Kingesi Kitanga, and that the 1985 register that the Defendants are relying on is marred with fraud and open illegalities. It was submitted that the 1<sup>st</sup> Defendant, being an official of the 3<sup>rd</sup> Defendant, manipulated the records of the 3<sup>rd</sup> Defendant and that the Plaintiff has proved that the Defendants fraudulently acquired the title to land known as Ndithini/Mananja Block 1/284.

33. The Defendants' advocate submitted that Kshs. 3,000 was paid by all the members of the Defendants as survey fees; that the confusion which the Plaintiff is perpetuating was committed by the former Secretary, Ng'ang'a Kilonzo and that the said Ng'ang'a made fraudulent alterations in the register of the 3<sup>rd</sup> Defendant.

34. The Defendants' counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title was obtained as a first registration on 2<sup>nd</sup> August, 2007 under the Registered Land Act (*repealed*) and that the same is sacrosanct and indefeasible.

#### **Analysis and findings:**

35. The claim by the Plaintiff is that his late mother, Wanza Tuta (*deceased*), is the owner of land currently registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants known as Ndithini/Mananja Block 1/285 (*formerly plot number 370*).

36. On the other hand, the Defendants' case is that the Plaintiff's late mother, who was a member of the 3<sup>rd</sup> Defendant, was allocated plot number 372, whose title is Ndithini/Mananja Block 1/284 and not plot number 370. While plot number 372 measures approximately 22½ acres, plot number 372 measures 3.04 acres. The only issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired parcel number Ndithini/Mananja Block 1/285 fraudulently or not.

37. The evidence by the Plaintiff and his witnesses was that the late Wanza became a member of the 3<sup>rd</sup> Defendant in 1984; that she paid Kshs. 3,000 which entitled her to 30 acres of land and that the value of one share was Kshs. 2,250 which was equivalent to 22½ acres.

38. The 1<sup>st</sup> Defendant, who was appointed as the Secretary of the 3<sup>rd</sup> Defendant in the year 2006, and who is still a Secretary until now, stated that the initial register of the 3<sup>rd</sup> Defendant was messed up by the former Secretary, Mr. Ng'ang'a, and that it is the genuine register that was used to generate the title documents. According to the 1<sup>st</sup> Defendant, the Plaintiff is indicated in the genuine register as owner of Plot No. 372 and not Plot No. 370.

39. The Plaintiff produced in evidence a receipt issued by the 3<sup>rd</sup> Defendant on 16<sup>th</sup> July, 1984 and another receipt dated 28<sup>th</sup> October, 1998. According to the receipt of 28<sup>th</sup> October, 1998, the payment of Kshs. 2,000 was in respect of survey fees. The receipt of 16<sup>th</sup> July, 1984 is also indicated to be payment of survey fees. The two receipts are signed by the former Secretary of the 3<sup>rd</sup> Defendant, Mr. Ng'ang'a.

40. In the letter dated 1<sup>st</sup> September, 1994, the 3<sup>rd</sup> Defendant's Secretary informed the Plaintiff's late mother, Mrs. Wanza, that the payment of Kshs. 3,000 was in respect of the shares and not survey fees. PW1 produced in evidence the list of shareholders of the 3<sup>rd</sup> Defendant as at 31<sup>st</sup> December, 1984. The list shows the name of the Plaintiff's mother, Wanza, as being the owner of 3.04 acres having paid Kshs.304.

41. PW1 also produced a register of the members of the 3<sup>rd</sup> Defendant as at 30<sup>th</sup> June, 1985. That list shows the name of Wanza Tuta as member number 296 and the owner of plot number 372 measuring 1.42 Ha (*approximately 3.5 acres*). On the same register, the name of Kingesi Kitanga was replaced by hand with the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the owners of land measuring 9.1 Ha (*approximately 22.7 acres*).

42. From the said register, the members who had plot numbers against their names run from number 1-306. However, the members' numbers 307-362 were not allocated any specific plot numbers. The list indicated that all those members were entitled to land measuring 9.1 Ha. That included Kingesi Kitanga whose name was replaced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' name on 16<sup>th</sup> March, 1987.

43. While still on the register of 1985, it was the evidence of the 2<sup>nd</sup> Defendant that the name Kingesi Kitanga referred to him; that the name was his nickname and that he sold 10 acres of his land to the 1<sup>st</sup> Defendant and that is why he co-owned the entire land with the 1<sup>st</sup> Defendant on 16<sup>th</sup> March, 1987.

44. The other document that the Plaintiff produced is a Letter of Allotment showing that his mother was allocated plot number 372 of L.R. No.11930. The said Letter of Allotment was signed by the Chairman and the Secretary of the 3<sup>rd</sup> Defendant on 14<sup>th</sup> January, 1989.

45. Come 30<sup>th</sup> June, 1993, another register of the 3<sup>rd</sup> Defendant was generated, this time showing the Plaintiff's late mother as the owner of plot number 370, parcel number 284. The register, unlike the previous two, did not indicate the acreage of the land. The Register indicates that plot number 372 will be one of the plots whose shareholders "*will get their plots through balloting*". The register further shows that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will be amongst the people who will go for balloting in respect to the remaining plots.

46. Another list of 30<sup>th</sup> June, 1993, which the Plaintiff stated was not genuine, shows that the Plaintiff's mother was entitled to plot number 372 whose parcel number is 284, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to plot number 372, whose parcel number is 284. That register does not show the acreage of the said parcels of land. On 16<sup>th</sup> August, 1994, the Plaintiff's mother was issued with a Letter of Allotment dated 16<sup>th</sup> August, 1994 for Plot No.370.

47. From all the registers, commencing from the initial one of 1984, with the exception of the 1993 register which was produced by the Plaintiff as PEXB 6(a), the Plaintiff's mother was indicated as the owner of land measuring 3.4 acres or 1.42 Ha. Indeed, the initial document that was prepared when the Plaintiff joined the 3<sup>rd</sup> Defendant clearly shows that she owned 3.04 having paid Kshs. 304.

48. The explanation by the Plaintiff and his witnesses that it was a mistake for the register of 1984 to indicate that the deceased only owned 3.04 acres instead of 22½ acres cannot be true. I say so because the same mistake could not have appeared in the register of 30<sup>th</sup> June, 1985 where it was indicated that she owned plot number 372 measuring 1.42 Ha.

49. Indeed, the Plaintiff's mother was issued with a Letter of Allotment for plot number 372 which tallies with the register for 1985. By the time the 1984 and 1985 registers were being prepared, the 1<sup>st</sup> Defendant was not an official of the 3<sup>rd</sup> Defendant. The 1993 register showing that she now owned plot number 370 can only be a manipulation of the initial registers by the then Secretary.

50. The issue of whether the 1<sup>st</sup> Defendant was also known as Kingesi Kitanga, whose name was replaced by the 1<sup>st</sup> Defendant's name and the 2<sup>nd</sup> Defendant is not material because Kingesi Kitanga, if he ever existed, has not complained. Indeed, the land measuring 9.1 Ha that was allocated to the said Kingesi has the same acreage as the suit property.

51. That being the case, and going by the records of 1984 and 1985, I am convinced that the only land that the late Wanza, the Plaintiff's mother, was entitled to, measured 3.04 acres and not 22½ acres. Indeed, the only land that she is entitled to is plot number 372 measuring 1.42 Ha (*approximately 3.5 acres*) as shown in the register of 30<sup>th</sup> June, 1985 and produced as PEXB 3b.

52. For those reasons, I find that the Plaintiff has not proved that the Defendants acquired parcel of land known as Ndithini/Mananja Block 1/285 fraudulently. The Plaintiff's suit is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**