



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 842 of 1988**

**JOHN KAMUNYU MURIGI.....PLAINTIFF**

**- versus -**

**PIRI MWATATA TEITEI.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR – KILIFI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff in this claim seeks a declaration

- (a) that the registration of the 1<sup>st</sup> defendant as the owner of the whole of plot No. Kilift/Mtwapa/40 is null and void;
- (b) that the plaintiff is entitled to 6 acres of plot No. Kilifi/Mtwapa/ 40 and that the said plot be subdivided into two (portions) with the plaintiff being registered as the owner of 6 acres thereof and a perpetual injunction to restrain the 1<sup>st</sup> defendant his agents and assigns from occupying, cultivating, transferring, alienating or any other way dealing with the plaintiff's portion of the said 6 acres.

The land the subject matter of this suit was initially registered in the name of one Mwatata Piri. Upon his demise the property which is 12 acres in size was by succession case No. 27 of 1981 transferred to a lady known as Mary James who also is now deceased. This lady was the wife of the original allottee Mwatata Piri. She was also the step-mother of the 1<sup>st</sup> defendant. Following the succession case Mary James was issued with a certificate of succession which she signed before the Kilifi Settlement Officer effectively becoming the proprietor of the plot. She also started to repay the Settlement Fund Trustees loan.

Prior to becoming the owner of the property, the Chief of Mtwapa wrote a letter to the court confirming that she was the correct person to inherit the plot and also stressed that the two sons of the late Mwatata Piri had agreed to the registration of Mary James as owner of the plot.

The 1<sup>st</sup> defendant claims that by this arrangement the said Mary James became a trustee on behalf of the family in respect of the plot and therefore she could not sell or in any way deal with the property to the prejudice of the two sons of Mwatata Piri but given the fact that there is evidence to show that those two sons had their own twelve acre plots within the same Settlement Scheme, the alleged existence of a trust would at best appear dubious.

Be the case as it may, by 1985 Mary James had repaid the Settlement Fund Trustee loan and the

department was in the process of preparing a discharge of the existing Settlement Fund Trustee charge. At the same time, it would appear, the lady was arranging to sell part of the plot to the plaintiff. On 27.2.86 she applied for and obtained from the local Land Control Board, consent to subdivide and sell 6 acres of the land to the plaintiff. At the same times an agreement dated 14.2.86 for sale of 6 acres portion of the plot had been executed by the plaintiff and the said Mary James. The terms of this agreement were that the purchase price would be Sh.66,000/= of which Sh. 20,000/= was paid on the date of execution of the agreement; 30,000/= on the date of the meeting of the Land Control Board and the balance of Sh. 16,000/= anytime to be agreed between the parties after the Land Control Board, but not later than three months thereafter. Upon the signature of the agreements the plaintiff was handed over the title documents relating to the property. The agreement was witnessed by 3 people whose names are given therein.

The parcel of land was subdivided and sub-divisional numbers for the new parcels namely 263 and 264 given, but Mary James died soon after the sub-division on 6.3.86 before the transfer of the subdivision to the plaintiff had gone through.

In his evidenced the plaintiff claims that he paid the sum of Sh. 20,000/= on the date of the agreements Sh. 30,000/ at the meeting of the Land Control Board and also the sum of Sh. 16,000/= immediately after the meeting thereby completing payment of the full purchase price. He therefore seeks orders of this court declaring him the owner of the land on the basis that he had purchased the land from Mary James, the registered owner before she died.

In resisting the plaintiff's claims the 1<sup>st</sup> defendant claims that Mary James, as successor of his fathers, was registered as the owner of the property and held it in trust for the family of the late Mwatata Piri. His contention was therefore that Mary James had no legal right to deal with the property without the 1<sup>st</sup> defendant's authority. The 1<sup>st</sup> defendant's second line of defence was that immediately after the death of Mary James he had been registered as owner of the land in 1987 following a succession case in Mombasa. He argued that the plaintiff had been indolent in the manner he had pursued his claim after the death of Mary James.

The position would thus appear to be that upon registration Mary James became the absolute owner of the property. Except what the 1<sup>st</sup> defendant said there is no evidence to suggest that her ownership was subject to any trust. Section 27(a) of the Registered Land Act (under which plot No. 42 is registered) provides as under:-

"the registration of a person as proprietor of land shall rest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto;"

I pose here to observe that one of the rights and privileges belonging or appurtenant to an absolute owner is the right to sell the property.

There is evidence (see Exh.5) that the 1<sup>st</sup> defendant had been interfering with the late Mary James ownership of the property. She had to seek the assistance of the District Officer to secure the release of the title documents to the property which the 1<sup>st</sup> defendant had taken from her. There is also evidence (see Exh.6) to show that after the lady's death the 1<sup>st</sup> defendant got involved in a dispute with the plaintiff and that several meetings in the presence of the local chief and the officer in charge Kijipwa police station had to be held. All this goes to show that the 1<sup>st</sup> defendant was well aware of the plaintiff's interest in the land well before 1987 when he surreptitiously went to court and obtained the order on the basis of which he subsequently became registered as owner of the plot in succession to Mary James.

The second crucial point to note about the case is that the said Mary James, just before her death, was in the process of selling the land to the plaintiff. Indeed the proposed subdivision and sale of the plot had gone through the Land Control Board and consent to both transactions had been granted prior to the death of the lady. The land had in the meantime been subdivided and new subdivisional numbers given.

Furthermore and most important, the full purchase price had been paid according to the evidence of the

plaintiffs which, being uncontroverted, I accept as true.

Section 122 of the Registered Land Act states:-

(1) Subject to any restriction on his power of disposing of the land, lease or charge contained in his appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing he shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.”

By virtue of the provisions of Section 122 of the Registered Land Act I am satisfied that having regard to the evidence adduced by the plaintiff in the case, the 1<sup>st</sup> defendant was registered as the owner of the plot and continues to hold the plot subject to the liabilities and rights which the late Mary James held the same one of which was the right of the plaintiff to have 6 acres thereof transferred to him.

In my judgment therefore the plaintiff is entitled to the orders he seeks and accordingly there will be judgment for the plaintiff against the defendants as prayed in the plaint.

Dated at Mombasa this 5<sup>th</sup> day of July, 1993.

**T Mbaluto**

**JUDGE**