



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 516 OF 2013**

**FRANCIS MUYA WAKUBUTU.....PLAINTIFF**

**VERSUS**

**BENJAMIN KIBUCI.....1<sup>ST</sup> DEFENDANT**

**JOSEPH NDUNGU.....2<sup>ND</sup> DEFENDANT**

**ADAMS MUHORO.....3<sup>RD</sup> DEFENDANT**

**WANGARI MWANGI.....4<sup>TH</sup> DEFENDANT**

(Sued as officials of Molo Kigeta Self Help Group)

**JUDGMENT**

*(Claim by plaintiff that he purchased various shares from his co-members in a Self-Help Group; plaintiff serving as secretary of the Group and crossing out the name of the member who sold to him shares; the sales not verified by the committee of the Group as other sales would; the claimed sellers not called as witnesses and not sued; one acre plots claimed to have been sold not existing as what exists are lots of 5 acres; claim found not supported to the required standard and dismissed with costs).*

1. This suit was commenced by way of a plaint which was filed on 3 September 2013 and amended on 30 January 2015. In the amended plaint, the plaintiff has pleaded that he is the legal owner of all the plots identified as Plots No. 4, 5, 6, 8, 10,11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 25,26,27,29,31,38,40,43,44,46,47,48,50,61,62,64,67,68,70,73,74,75,76,77,78,79,80,89,91,93,94,95,96,100,103,104,106,107,108,110,111,112,113,114,116,118,120,122,130,131,132,133,134,135,151,154,155,156,157,158,159,160,166,174,176,177,178,179,180,181,182,182,183,184,185,186,187,188,189,190,192,194,195,196,197,200,201,202,203,204,207,209,210,212,213,214,216,217,218,219,228,229,230,231,232,233,240,241,242,243,249,251,252,253,254,255,256,257,258,259,260,261,262,263,265,268,269,270,271,273,274,275,276,277,278, and 279 all totaling to 151 plots that he personally obtained and /or purchased from Jane Muthoni Kanyua, Wambui Njoroge, Samuel Njuguna, Mary Muthoni Njuguna, Margaret Wambui, Mary Muthoni Njugu, Mary Njeri Njoroge, Mary Muthoni Maina, Elizabeth N.Kimani, Hannah W.John, Tabitha Wanjiru, John M.Gatimu,Hanah W.Wanjohi, Tabitha W. Mwangi, Mary Njoki M, Nancy W.Thiongo, John Njuguna,Ngotho Kimani, Teresiah Nduta Mwangi, Tabsabey Kipsoi, Patrick Njoroge Mwangi, Hannah Wambui, Njeri Njoroge Kimani, Waithira Njenga,Mbugua Njuguna, Francis M.Wakabutu,Hannah W. Kariuki, Njoroge Wahome, Hannah W. Wamaitha, Hannah Wanja Kariuki, Mary Njoki Njoroge, and Teresia N.Mwangi. He has pleaded that the defendants, using their positions in the Molo Kigeta Self Help Group, have persistently frustrated his ownership of the suit properties by trespassing into them and denying him peaceful and quiet use of them and by purporting to sell them to third parties fraudulently. In this suit, the plaintiff has asked for an order of eviction and perpetual injunction, restraining the defendants from interfering with the suit properties. He has also asked for an order that the defendants' acts of selling and disposing off the suit properties is illegal and they should desist from the same. The plaintiff has further sought orders of general damages and mesne profits alongside the costs of this suit.

2. In their amended defence, the defendants denied that the plaintiff is the owner of the 151 plots in issue. They pleaded that Molo Kigeta Self Help Group owns 280 acres of Kikopey Ranch Gilgil, which land is supposed to be subdivided and given to its 146 shareholders. It is pleaded that out of this acreage, 10 acres was sold to settle a debt owed to the original owners. It is pleaded that the plaintiff's claim to 151 plots is not genuine as the plaintiff abused his position as Secretary of the Group, to alter, amend, cancel and manipulate the records of the Group to the disadvantage of members. It is denied that the plaintiff has been in occupation of any plot out of the remaining 270 acres as the Group is yet to subdivide the land to allocate it to its members. They have averred that the map the plaintiff is using to claim the 151 plots is not genuine, and was a creation of the plaintiff as a vehicle to defraud the Group and its members, and it is said that the map comprises of 200 acres instead of the actual acreage of 280.

3. The plaintiff's evidence was to the effect that some workers of the late Hon. Njenga Karume, based in a couple of Hon. Karume's farms in Molo, organized themselves and contributed money from deductions of their salary, so as to purchase land. The plaintiff himself was not among the workers but was a catechist to Margaret Njeri, the wife of the late Hon. Karume, and he also paid to be allocated land. He first paid Kshs. 5,000/= and later he gave Kshs. 1,000/= to make a total contribution of Kshs. 6,000/=. Land was found in Gilgil, and although not everyone was happy with land in Gilgil, which they thought was not very arable, a list of 146 persons was compiled and another 11 people added to make a total of 157 people entitled to the land which was owned by GEMA. He produced this list as an exhibit. The plaintiff was appointed Secretary and they were shown the land which was 280 acres. He testified that instructions were given for this land to be subdivided into portions of one acre, and that the surveyor did so, and they were to take possession. He stated that each Kshs. 1,000/= contributed entitled one to one acre of land, and he was thus given 6 acres, out of his contribution of Kshs. 6,000/=. It was also resolved that land would be distributed according to money that had been received. He stated that the first batch of persons allotted the land were 149 persons who attended on the first day of allocation. He also mentioned that each member was supposed to contribute an additional Kshs. 6,200/= as survey but this money was being contributed very slowly. He testified that the 1st defendant was not present when land was first distributed as he had been jailed.

4. He testified that many of those who had been allotted the land wished to sell the same and he purchased several of these plots from them. He stated that he has written agreements for the plots he purchased. He testified that when he purchased land from a member, he would cross out the member's name from the original list of members. The persons selling to him land would then give him their original payment receipt and he would keep it together with the sale agreement. He stated that he purchased the following : -

9 shares from one Mary Njoki;

9 shares from one John Kamau;

6 shares from one Mary Njeri Njoroge;

6 shares from one Nancy Wanjiku Thiongo;

7 shares from one Tabitha Wanjiru Mwangi;

5 shares from one Njoroge Mwangi;

8 shares from Elizabeth Wanjiru Kimani;

6 shares from one Tabitha Wanjiru;

6 shares from one John Njuguna;

5 shares from one Hannah W. John;

4 shares from one John Mwangi Gatimu;

6 shares from one Hannah Wanjiru Kariuki;

7 shares from one Ngotho Kimani;

9 shares from one Samuel Njuguna;

5 shares from one Margaret Wambui;

3 shares from Wambui Njoroge;

2 shares from Tapsabei Kipsoi;

10 shares from Mbugua Njuguna;

5 shares from Njeri Njoroge;

2 shares from Waithera Njenga;

5 shares from Jane Muthoni;

6 shares from Anna W. Wamaitha;

6 shares from Mary Muthoni;

10 shares from Hannah Wanjiru Wanjohi;

9 shares from Samwel K. Mungai.

5. He testified that in total, he acquired about 159 shares although, he did mention that in actual fact, he had purchased much more, only that he lost some documents in the year 2004. All along, he was the Secretary of the Group, but he stopped being an official in the year 2007. He testified that the land was subdivided into 279 one acre plots and other smaller commercial plots, in total 288 plots. There were 157 members, but it is only those who presented themselves who were shown their plots in the year 1985. These were just about 89 persons. He testified that the others had to wait for more land to be availed by GEMA, as in total, they had raised Kshs. 360,000/=, which entitled them to 360 acres from GEMA. He stated that all plots got exhausted by the 89 persons who claimed their shares. The committee urged members to raise the Kshs. 6,200/= survey fees but they could only raise Kshs. 150,000/=. He testified that the 1st defendant has 3 shares but he never presented himself in the first allocation of land.

6. He testified that after his removal from office, he sought to claim his land but the defendants as the new officials refused. Some meetings were then held in both Molo and Gilgil under the auspices of the Chiefs and it was resolved that no one disputes to having sold land to him.

7. He averred that he knows where the plots he purchased are located on the ground and he has even sold a few of them. He further stated that the 10 acres sold by the Group so as to raise funds, belong to him. He testified that the new officials drew a fresh map which has affected what belongs to him.

8. Under cross-examination, he stated that he does not have a list of the individual contributions of members, which was being kept by the companies where they worked, as the money was being deducted directly from their salaries. He affirmed that he served as Secretary from the year 1985 to his removal in the year 2007. He testified that in the year 1985, GEMA issued the Group with an allotment letter for 280 acres which he handed over to the new officials. He stated that at the time he left office, title deeds were yet to be obtained. He acknowledged that the initial list of members is typed and has 145 names but there is a handwritten list bearing 157 names. He affirmed that he would cross out the names of the members that he had purchased land from the list. He testified that the Committee would endorse the sales, by members to himself although this was never put in writing. He had a problem with being instructed to claim what he had purchased directly from the members, as to him, he has already purchased their shares. He conceded that some of the receipts he holds bear rubberstamps and some do not. He stated that the meeting that was held to verify the sales was arranged in such manner that those who disputed selling to him land would attend to refute the sale. He admitted having sold about 21 acres to non-members which he said were from his entitlement.

9. I put a few questions to him and he acknowledged not having the list of 89 people who were allotted land in the first instance. He also had nothing to show that he was actually allotted any land, or the particular plot allotted to him, or indeed how the plots were distributed. He also had nothing to show that the persons he claimed to purchase land from were actually allotted land. He stated that persons were in a queue and land was pointed out to them by a Mr. Nganga.

10. PW-2 was one Simon Royson Njoroge, who previously served as the Chief of Gilgil from the years 1981 to 2002. He stated that he is well acquainted with the defendant Group and was aware that they purchased 280 acres from GEMA, situated in Gilgil. He testified that a balloting exercise was done in the year 1985 at the farm and every person who balloted was shown his/her land. For those who did not attend, the extra ballots were given to the officials, so that they could go and ballot in Molo. He stated that the plaintiff balloted for land, and also purchased from others about 150 shares, each being of one acre. Cross-examined, he stated that he had a list of those who balloted but he handed it over to the Group. He mentioned that those who did not ballot on the day, were later shown their plots. He stated that some members wished to sell their land but none of the agreements were written in his office.

11. PW-3 was one Bernadette Wanjiru Mwaniki who is a registered planner. She testified that in the year 1985, she was contracted by the late Hon. Karume to subdivide the land in dispute to members of the defendant Group. She was handed over a plan which had subdivided the land into 5 acre plots and instructed to subdivide them into one acre plots and provide for an area for community services. She did the work but was not able to complete the same into titles as there was a problem with the head title. Cross-examined, she stated that she was to carve out 280 acres from the mother title, LR No. 11106. Her plan was never approved but was used to allocate land and she verified that she was not involved in the allocation of land. The land allocated to the defendant Group was identified as Block G. What she did was to substitute the one acre plots for the five acre plots.

12. PW-4 was one Samuel Njoroge Mbugua. He served as Assistant to the plaintiff while he served as Secretary of the Group. He testified that some members sold their shares to the plaintiff and their names would be crossed out. He testified that the persons however never came to their office to have the change formally effected. Cross-examined, he stated that he was an employee in one of the farms, and their salaries were being deducted. He affirmed that they were not getting receipts for their deductions, but receipts were only issued to those who paid in cash. He testified that where one member sold shares to another, they would appear before the Committee to inform the Committee of the sale. A transfer in writing would then be done using a fullscap paper and one copy would remain in the office. Upon transfer, the name of the seller would be crossed out. He stated that he has never met anyone who mentioned having sold land to the plaintiff, and averred that if there were any sales to the plaintiff, there would be a record of these in the office. He affirmed in re-examination that it would be improper for members to transact without coming to inform the Committee and they would write minutes to confirm the transaction.

13. With the above evidence, the plaintiff closed his case.

14. DW-1 was Benjamin Kabochi, the current Chairman of the Molo Kigeta Group having come to office in the year 2007. He testified that he is among the founder members of the Group which he joined in the year 1976 while he was an employee in one of the late Hon. Karume's farms in Molo. He acknowledged that the plaintiff was also a member, although not as an employee, but through his affiliation to Margaret Karume. He testified that the Group originally had 145 members. He produced the list of members and a minute book for meetings. He testified that upon their election, they went to the offices of GEMA to find out the position of their land as he had been handed over an allotment letter showing 280 acres. They sent a surveyor to the ground but he only identified 125 acres on the ground. They went back to GEMA who instructed the surveyor through a letter dated 9 July 2008, to add for the Group another 95 acres. A second letter dated 6 February 2014, instructed that they be given an additional 63 acres, thus in total, he stated that the Group has received 217 acres. He testified that he managed to obtain a letter dated 20 September 2005 from GEMA, which indicated that the land had been subdivided into 56 plots of

5 acres each. They received titles for 43 of these 5 acre plots, about 215 acres in the year 2013. These titles have been issued in the name of the Group.

15. He testified that he was unable to find any legitimacy in the alleged purchase by the plaintiff of shares from other members. He pointed out that it was the plaintiff, as Secretary, who used to keep records and it is him who made the alterations in the records, to show that he has purchased shares and the Committee was never involved. He stated that on a sale of shares, a member would sign a transfer form and he never found any in favour of the plaintiff. He testified that he has been unable to get even one person to affirm that he sold his/her shares to the plaintiff. He testified that they have no problem on the ground, save for three persons who are non-members, and who claim to have purchased land from the plaintiff. He contended that the plaintiff manufactured a survey plan for the sole purpose of selling plots. He averred that his sole purpose is to ensure distribution of the land to its members and will proceed to do so once they obtain the shortfall of 65 acres.

16. DW-2 was one Patrick Njoroge Mwangi. He testified that he is a founder member of the Molo Kigeta Group and was an employee in one of the Hon. Karume farms. He stated that he purchased 4 shares and sold one share. They did a transfer before the Chief of Gilgil. He testified that he is aware that the plaintiff alleges to have purchased 2 shares from him which he denied selling to the plaintiff. He pointed out that the agreement produced by the plaintiff bore the wrong name and wrong ID number.

17. With the above evidence, the defendants closed their case.

18. I invited counsel to file written submissions, which they did, and I have taken these into account in arriving at my decision.

19. In a nutshell, the plaintiff claims the various plots that he has identified in his pleadings by virtue of them comprising of his own shares and what he claims to have purchased from other members. His case is premised on the claim that there was a demarcation of the land in the year 1985, and persons who were present, about 89 people were shown their plots. He further claims to have bought about 159 acres of land from the shareholders of the Molo Kigeta Group. He has averred that upon purchase, they would do an agreement and the sellers would give him their receipts. He would then cross out their names from the register of members of the Group. All this is of course refuted by the defendant.

20. I have assessed the evidence of the parties. I have seen that indeed, the plaintiff did cross out some names from the register of the members of the Group, and inserted his initials on the claim that he purchased their shares. I am sorry to inform the plaintiff that if indeed he purchased shares from the members I do not have sufficient evidence of this.

21. Firstly, the plaintiff did not call any person, not even one, of the persons alleged to have sold to him their shares. What he produced were agreements, which he acknowledged to have written most of them, and receipts in their names. Unfortunately these receipts were never authenticated. I have evidence, which I am unable to wish away, that persons were being deducted money from their salaries, and this was said to be in small bits, and for these deductions, no receipts were issued. The plaintiff however seems to have receipts bearing relatively huge amounts of money paid at once, which was never properly explained. For example, there is a receipt in the name of Njoroge Wahome, dated 13 April 1982, for Kshs. 9,000/= and several others of Kshs.3,000/=.

22. I also find it odd that the plaintiff, who was the custodian of the members' records, would be the same person to authenticate his own purchases within the company, without any independent verification by other members of the executive committee. I think for purposes of authentication, it would only have been proper for the plaintiff to have another member of the Committee do the verification of his claimed sales which was not done. It would be dangerous for this court to set a precedent where a person holding a position of trust, such as that held by the plaintiff, would perform a task which benefits himself without there being any independent verification. Apart from the above, there is evidence that other transfer of shares by other members within the Group were done by way of transfer and these persons did appear before the Committee. In fact, the transfer instrument made by DW-2 was verified by the plaintiff himself as Secretary. I wonder why, his purchases did not follow the same path of verification as other sales did. I must of course, in light of this evidence, doubt the authenticity of the agreements displayed by the plaintiff which are not accompanied by any transfer instrument and any independent verification.

24. I do note that the plaintiff claims that there was an exercise conducted in the year 1985 where some 89 members were shown their plots. He of course claims to have purchased from these persons who were shown plots. However, I have no document from the plaintiff, of any allocation exercise of plots. Neither do I have any evidence that there was a balloting exercise as claimed by PW-2. If at all plots were allocated as claimed, I also have no evidence of the persons who benefited from these allocations, and I am unable to marry this alleged allocation, to the persons who allegedly sold their shares to the plaintiff. In other words, I have no evidence that the persons who it is claimed sold land to the plaintiff, comprise of the persons who either balloted or were shown plots in the year 1985.

25. The plaintiff's claim is one for several plots, 151(or probably 152) in total, which he has identified in his pleadings and marked in a survey plan that he produced. However, it is apparent that these plots do not exist as identified. The defendant has availed to me evidence that they have been issued with titles to 5 acre plots. These are actual titles and supercede any plot numbers drawn in a subdivision plan. The plaintiff called the planner who was instructed to subdivide into one acre plots the land allocated to the defendant group. But PW-3, the said planner, acknowledged that this proposed subdivision was never approved and it was left at that, a proposed subdivision. What seems to have happened is that titles were issued based on the initial 5 acre lots and not the proposed subdivisions of one acre. The plaintiff's claim is therefore based on plots which do not exist at all. Neither have I been given any evidence that the titles to the 5 acre plots were issued through a fraudulent exercise, so that I can proceed to nullify them, forget for a moment, that I do not have any prayer seeking a nullification of these titles.

26. The argument of the plaintiff appears to be that if the members whom he claimed to have purchased land from, have not come forth to complain, then his alleged purchases must be approved. That is a flawed argument. On the contrary, the correct approach should be that if a person acknowledges to have sold land, it is for the plaintiff to avail that person to affirm that acknowledgment, so that the same can be authenticated and verified by the Group, and so that the Group can now be in the knowledge that one of its members has sold shares. The burden cannot be shifted to a person to demonstrate that he/she did not sell to the plaintiff land; the burden remains with the plaintiff, to show that the persons he alleges to have sold him land, have actually sold to him the land as claimed.

27. I have evidence that the defendants, as officials of the Group, intend to subdivide the land and allocate it to its members. That should be applauded and that process should be allowed to continue. Hopefully, the defendant Group is going to get its full entitlement from GEMA and distribute land to all its members according to their approved shareholding. It is only fair that each member get his/her rightful share according to his/her contribution. Such member upon being allocated his/her respective plot can of course transact, including transferring it to the plaintiff. If at all the plaintiff feels that a member who had sold him land is not handing it over, he has the option of suing such member for the said land, and he can then prove that the said member actually sold to him, his/her entitlement and he should thus be owner of the said land. 28. The said members who are said to have sold their shares to the plaintiff are not parties to this suit and I have not had an opportunity to hear from them. It would be unwise for this court to issue orders against their interests without first hearing from them.

29. Evidence was led that the plaintiff has purported to sell some plots to other people. I have doubts as to whether the plaintiff could have capacity to sell plots to other people based on a survey plan that has not been approved. But I do not want to say more on this as this is not an issue before me.

30. From the foregoing, it is clear that I do not find merit in the plaintiff's suit and the plaintiff's case is hereby dismissed with costs.

31 It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 10<sup>th</sup> day of May 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Ms. Alwala holding brief for M/s Kiplenge & Kurgat Advocates, for the plaintiff.

Mrs. Oliech holding brief for Mr. Ndubi for the defendants.

Court Assistant: Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**