



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
OF KENYA AT NAIROBI
ELC. CASE NO. 140 OF 2013 (O.S.)

LAWRENCE MBURU.....1ST PLAINTIFF
 PAUL CHEGE MUTHIGA.....2ND PLAINTIFF
 JOHN MBURU MUTHIGA3RD PLAINTIFF

(AS ADMINISTRATORS OF THE ESTATE OF MUTHIGA NJOGU, DECEASED)

VERSUS

BENSON MATHENGE GITARI.....1ST DEFENDANT
 MARY WAIRIMU MATHENGE.....2ND DEFENDANT
 THE HON THE ATTORNEY GENERAL.....3RD DEFENDANT

J U D G M E N T

1. Three applicants brought this Notice of Originating Motion on behalf of the estate of their deceased father. As at the date of hearing the 1st applicant had since the institution of the suit passed on. The 2nd and 3rd applicants prosecuted this suit on behalf of the estate of the deceased.

2. The case proceeded as a formal proof since the defendants never defended the suit. The 1st and 2nd respondents are natural persons. The attorney general is the 3rd defendant. At the hearing of the suit on the **18th May 2017** Mr Mugo appearing for the plaintiffs applied for leave to effect an amendment to the date and **prayer number 2** on the originating summons and it was allowed. The Originating Summons therefore is dated **28th January 2013** instead of **28th February 2013** which was clearly an error.

3. **Prayer Number 2** was amended to read as follows:

“An order be and is hereby issued directing the chief land registrar to rectify the title deed in respect to title no Nairobi Block 126/500 to read the names of the 2nd and 3rd applicants in place of the 1st and 2nd respondents herein and that a title deed be issued in those joint names on behalf of the Estate of Muthiga Njau (deceased).”

4. Leave having been granted to these two amendments the plaintiffs gave evidence. According to the

plaintiffs, they are the administrators of the estate of their late father Muthiga Njogu and they bring these proceedings on behalf of the said estate.

5. Their case is that their father was since the early **1970s** a shareholder and Member Number 468 in a company known as Ngundu Farmers' Cooperative Society Limited. He was therefore entitled to a parcel of land from the company.

6. On the **8th December 1978** the deceased balloted for and was allotted a parcel of land within Nairobi County being **Plot No Nairobi Block 126/500** measuring **2.070 ha**. He was shown beacons to the said parcel by the Surveyor employed by that company.

7. However before title documents were issued, Ngundu Farmers Cooperative Society Limited was placed under receivership. The receiver commenced the preparation and issuance of the title deeds to the members of the company. The plaintiffs' father passed on before the title issuance exercise was over. However the official receiver held that the deceased was entitled to the suit land.

8. In the year **2006** the plaintiff's state, the **1st** and **2nd** defendants, contrary to the Receiver's instructions trespassed on the suit land, occupied it and caused the same to be registered in their joint names. Despite instructions of the receiver to the contrary the Land registrar caused the land to be registered in the names of the **1st** and **2nd** defendants.

9. The plaintiffs plead that the Land Registrar has refused to rectify the title deed in respect to the suit property and that that to conceal the flawed exercise the Land Registrar has refused to produce the records in respect of the allotment of the suit land as well as all relevant information leading to the flawed registration. The plaintiffs therefore seek the prayers in the Originating Notice of Motion.

10. There was no opposition to the suit. However, I am satisfied that the Attorney General was served with a demand letter before the suit was filed. The demand letter was produced and marked as "**P Exh 10**". It clearly states the plaintiff's case. This letter was apparently forwarded to the Permanent Secretary Ministry of Lands vide a letter dated **9th September 2011** which was copied to the plaintiff's advocate.

11. The reply to that letter was produced as "**P Exh 11**". That is a letter addressed to Dorothy Angote, the then Permanent Secretary, Ministry Of Lands, informing her of the plaintiff's intention to file these proceedings. It is signed on behalf of Muthoni Kimani, Senior Deputy Solicitor General.

12. In my view the following are the pertinent issues arising from this suit:

1. Was the deceased Muthiga Njogu a member of the Ngundu Farmers Cooperative Society Ltd?

2. Was the deceased entitled to the suit land?

3. What remedies should the court issue to the applicants?

The issues are addressed as hereunder.

1 . Was the deceased Muthiga Njogu a member of the Ngundu Farmers Cooperative Society Ltd.

13. **PW1** produced copies of the **Share Certificate No 468** held by the deceased in the company. He also tendered copies of receipts which he had received for payment of various sums either to the company or to its advocate.

14. **Receipt No 055** dated **18/4/08** for **Ksh 10,000/=** being the payment for a bonus plot bore the name of Ngundu Farmers Cooperative Society Ltd. **Receipt No 078** for **Ksh 11,000/=** dated **27/6/2008** being the

payment for transfer fee also bore the name of Ngundu Farmers Cooperative Society Ltd. Receipt **No 1890** dated **26/3/08** for Ksh 1,000/= being the payment of legal fees bore the name of Muchui & Co Advocates, whom **PW1** identified as the advocates who held the Company's list of members.

15. It was stated as a background for the production of these copies that the originals had already been forwarded to Muchui & Co Advocates to facilitate the transfer of the desired name.

16. From all the documentary evidence that was tendered in court I have no doubt that the deceased was a member of the Ngundu Farmers Cooperative Society and that he was entitled to land, being **LR Number Nairobi Block 126/500**.

2 . Was the deceased entitled to the suit land?

17. The main evidence relied on in this case is the letter from Philip U. Uluma, the Liquidator, Ngundu FCS Ltd dated **18th June 2008** written to the Commissioner Of Lands stating that Muthiga Njogu & Sons are the registered owners of plot Number **Nairobi Block 126/500**. It asks that the Commissioner do facilitate a transfer of the land "in his name". Attached to that letter is a transfer apparently signed by the Liquidator authorising the transfer of the suit land to Muthiga Njogu & Sons.

18. There is, in addition, a letter from Muchui & Co Advocates, who the court learnt from **PW1's** evidence was the transaction advocate for Ngundu Farmers Cooperative Society Ltd and who had the list of members of the Society. The letter is directed at the Commissioner of Lands and it explains why the land could not have been registered in the names Muthiga Njogu & Sons. The reason was that Muthiga Njogu & Sons was not a legal entity or a juridical person. From the contents of the advocate's letter to the Commissioner, it appeared that cases of shareholders not being issued with title owing to the name they had issued were common in the history of the Ngundu Farmers Cooperative Society Ltd.

19. According to the advocate, though the land was not registrable under that name, it still remained the property of those persons whose composite names were encompassed in the name Muthiga Njogu & Sons. There is no explanation as to how the land came to be registered in the name of the 1st and 2nd defendants. That registration is, in the face of all the documentary evidence emanating from the various offices that dealt with the suit land, irregular and ought to be annulled.

20. I therefore find that the deceased was the person properly entitled to all that land comprised in **LR NO Nairobi Block 126/500**.

3. What remedies should the court issue to the applicants?

21. Having perused through the record I find that the plaintiffs herein being the administrators of the estate of the late Muthiga Njogu have the right to bring these proceedings. I also find that they have brought sufficient material before this court that proves on a balance of probabilities that they are entitled to the prayers sought.

22. I therefore issue the following orders:

1. A declaration that the plaintiff, jointly with the deceased were the rightful owners of Land Title number Nairobi Block 126/500.

2. An order directing the Chief Land Registrar to rectify the title deed in respect to Title No Nairobi Block 126/500 to read the names of the 2nd and 3rd applicants on behalf of the Estate of Muthiga Njogu (deceased) in place of the 1st and 2nd respondents herein and that a title deed be issued in those joint names on behalf of the Estate of Muthiga Njogu (deceased).

3. The costs of these proceedings shall be borne by the defendants jointly and severally.

It is so ordered.

Signed at Kitale on this 11th day of July, 2017

MWANGI NJOROGE

JUDGE

Dated, signed and delivered at Nairobi on this 19th day of July, 2017

K. BOR

JUDGE

Judgement read in open court in the presence of:

Mrs. Mugo for the Plaintiffs

No appearance for the Defendant

Court Assistant: V. Owuor.

K. BOR

JUDGE