



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 205 OF 2016**

**NJERI KIRIBA.....PLAINTIFF**

**VERSUS**

**KENYA IHENYA COMPANY LTD.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff sued Kenya Ihenya Company Limited in Thika CMCC No. 162 of 2015 seeking an injunction to restrain the company or its servants or agents from harassing the Plaintiff and trespassing on her parcel of land. The land in question is stated at paragraph 6 of the plaint as plot numbers 144 and 145 Kenya Ihenya Company Limited.
2. The Plaintiff avers that she bought these two plots from the Defendant and was issued with a share certificate. Despite paying the full agreed amount to guarantee the Plaintiff ownership, the Defendant denied the Plaintiff ballot papers in respect of the two plots.
3. The Plaintiff claims to have reported the matter to various Government authorities who were unable to resolve the matter due to lack of cooperation on the Defendant's part.
4. The matter was transferred to this court following the decision in **Malindi Petition No. 3 of 2016** which found that the Magistrates Courts had no jurisdiction to deal with land matters. That decision was later overturned by the Court of Appeal.
5. The Defendant filed its defence on 2/8/2017 in which it admitted that the Plaintiff was its member and that she was issued with share certificate number 576 on 5/6/1983. It avers that it was resolved at the Defendant's general meeting held in 1985 that in order to be allocated a plot at Githurai, Thika Road each member was required to pay Kshs. 3,500 per plot. The Defendant avers that since the Plaintiff was unable to raise the full amount for the two plots, she was allowed to pay for plot number 145 by instalments which she completed in 1996.
6. The Defendant avers that plot number 144 is currently owned by Mary Muthoni Ndegwa pursuant to the letter of allotment dated 19/9/2012 for which she paid the fees for certificate of title on 29/7/2015 at Ardhi House, Nairobi. The Defendant avers that Mary Muthoni Ndegwa bought plot numbers 144 and 143 from the previous owners who bought them from the Defendant.
7. The Defendant maintains that the Plaintiff's receipts dated 27/9/1995, 1/11/1995 and 27/6/1996 in respect of Kshs. 2,500, Kshs. 1,500 and Kshs. 100 respectively are self-explanatory and relate to plot number 145 only and not plot number 144. Apart from filing the defence, the Defendant did not adduce any evidence in court.
8. The dispute relates to ownership of plot number 144 which both the Plaintiff and Mary Muthoni Ndegwa lay claim to.
9. The Plaintiff relied on her witness statement dated 14/8/2017 together with her list of documents filed in court on 8/6/2017. The Plaintiff who is 93 years old testified that in 1973 one plot was equivalent to 7 shares valued at Kshs. 700. This was reviewed in 1976 to 21 shares valued at Kshs. 2,100 per plot. She testified that she completed paying Kshs. 2,100 for 21 shares on 10/8/1980 vide receipt number 16. She produced a copy of certificate number 376 together with the receipt for the payment of the surveyor's fees

of Kshs. 600. She testified that she bought the second plot and completed making payment on 5/6/1983.

10. The Plaintiff produced the letter dated 27/4/2012 addressed to the Minister for Lands requesting to be issued title deeds in respect of her two plots numbers 144 and 145 in Githurai 45. She states in the letter that for the last 15 years she had been denied the ballot papers in respect of the two plots which she bought from the Defendant despite making full payment.

11. She refers to the numerous visits she made to the area Government authorities, the District Officer and the Chief Kasarani Division in an effort to get the Defendant company to process her titles. She states in her letter that she last reported the matter to the Provincial Commissioner Nairobi who referred her to the Ministry of Lands Headquarters, Ardhi House for the issuance of title deeds. Her titles could not be processed owing to the fact that the Defendant had not paid rates.

12. The Plaintiff produced a copy of the Defendant's share certificate number 576 dated 5/6/1983. The certificate is for 42 shares. The Plaintiff also annexed receipts issued by the Defendant for the payments she made as follows: -

<b>NO.</b>	<b>DATE</b>	<b>AMOUNT</b>	<b>NO.</b>	<b>DATE</b>	<b>AMOUNT</b>
1	04-05-73	32	23	23-07-78	200
2	27-05-73	40	24	24-06-79	100
3	10-06-73	20	25	02-09-79	400
4	24-06-73	10	26	03-08-80	100
5	08-07-73	10	27	10-08-80	20
6	15-07-73	5	28	17-08-80	200
7	14-08-73	20	29	23-08-80	150
8	28-10-73	20	30	31-08-80	215
9	18-11-73	25	31	04-10-80	50
10	02-12-73	20	32	02-11-80	400
11	24-02-74	20	33	30-11-80	200
12	30-06-74	40	34	30-11-80	200
13	02-01-75	200	35	11-04-81	100
14	18-01-75	165	36	11-10-81	100
15	04-05-75	100	37	17-10-81	100
16	18-05-75	20	38	16-11-81	200
17	15-06-75	20	39	05-09-82	600 (Survey fees)

18	17-08-75	80	40	30-05-83	200
19	19-12-76	30	41	05-06-83	150
20	16-01-77	60	42	05-06-83	20
21	27-03-77	215	43	15-10-83	495 (Survey fees)
22	04-12-77	35	44	20-06-88	450
			45	27-09-95	2,200

14. The Plaintiff also produced copies of receipts issued by the Defendant in respect of the following payments she made for the plot in Embakasi Phase III: -

<b>DATE</b>	<b>AMOUNT PAID</b>
9/8/1988	200
6/9/1988	400
16/11/1988	400
9/8/1991	300
31/12/1991	200
2/3/1992	600
17/1/1995	500
6/9/1995	250

15. The Plaintiff's claim as pleaded relates to Plot numbers 144 and 145 but in her submissions the Plaintiff urged the court to direct the Defendant to allocate her the plot in Embakasi that she paid for between 1988 and 1995. The court will not make a finding on the Embakasi plot but takes note of the payments the Plaintiff made to the Defendant.

16. The Chief for Kahawa Location, Nairobi wrote to the DCIO Kasarani on 4/11/1998 asking him to intervene and assist the Plaintiff while making reference to the case he had forwarded some months back about the corruption of the Defendant's directors.

17. The letter dated 8/5/2012 addressed to the Permanent Secretary, Ministry of Co-operatives from the Ministry of Lands states that the Defendant had failed to issue ballot papers to the Plaintiff for parcel numbers 144 and 145 Githurai 45 despite the intervention of the provincial administration. The letter stated that the Ministry could not proceed to process the titles unless the Defendant provided the necessary documents. The letter sought the intervention of the Permanent Secretary to enable the old lady access the ballot papers from the Defendant.

18. The District Officer Kasarani wrote to the Defendant on 28/6/2001 after its committee members failed to attend a meeting called for that day. The District Officer stated in the letter that he believed the Plaintiff was the owner of the two properties. The letter urged the Defendant to issue the Plaintiff letters of allotment so that she can enjoy peaceful occupation of her plots.

19. The letter dated 18/10/2011 from the Provincial Commissioner requested the Commissioner of Lands to assist the Plaintiff get her rightful documents in light of the length of time it had taken and her age. The Plaintiff produced receipts dated 1/11/1995 and 27/6/1996 paid to the Defendant on account of rates for plot number 145.

20. Mary Muthoni Ndegwa who claims that plot numbers 143 and 144 belong to her attended court and testified on behalf of the defence. She relied on her witness statement filed in court on 2/8/2017. It was her testimony that the Plaintiff could not raise the full amount for the two plots demanded by the Defendant and was allowed by the Defendant to pay for one plot only which is Plot No. 145. There is no dispute that plot no. 145 belongs to the Plaintiff.

21. She avers that she is the current owner of plot numbers 144 and 145 having bought these plots from Ben W.K. Muigai on 24/6/1997, who in turn bought them from David Ithungu. David Ithungu is stated to have bought the plots from Christopher Saina on 7/10/1987. She claims that as the fourth owner of the plot she is protected by the law.

22. She relied on copies of letters dated 7/10/1987 and 24/6/1997 as evidence of transfer of plot numbers 143 and 144 by the previous owners. The letter dated 7/10/1987 requested the Secretary of the Defendant company to transfer the plots from Christopher K. Saina to David Mbugua while the letter dated 24/6/97 addressed to Mary Muthoni Ndegwa acknowledged receipt of her payment of Kshs. 160,000/= for plot numbers 143 and 144 Githurai Shopping Centre.

23. Mary Muthoni Ndegwa produced a copy of the receipt for Kshs. 3300/= which the Defendant issued to her on 8/9/1997 on account of transfer for plots numbers 143 and 144 on L.R. No. 3811/5. She also produced a copy of the share certificate no. 895 issued by the Defendant in respect of the 30 shares she held.

24. She produced the subdivision scheme approval dated 19/9/2012 which stated that upon her acceptance of the special conditions of the lease and payment of charges, she would be issued with a lease for Nairobi Block 124/144. She accepted the conditions vide the letter dated 27/7/2015 and made payment on the same day.

25. She contends that the Defendant duly acknowledged the sale and transfer to her by issuing her a receipt for the transfer fees of Kshs. 3,300/= and ballot paper for plot number 144 on 8/9/1997. Then on 19/9/1997 the Defendant issued her certificate number 895 in respect of her 30 shares.

26. The Defendant wrote to Mary Muthoni Ndegwa on 2/11/2004 notifying her that titles for Phase 1 were ready for collection by those who had already paid for them.

27. She also produced a copy of the letter dated 24/12/1998 addressed to the Plaintiff which reads as follows:

“I wish to inform you that you have been occupying my plot no. 144 illegally hindering my development of the same.

By a copy of this letter I give you 14 days to remove what you can claim that it belongs to you.

I will develop the plot by the end of this same notice without further notice.’

28. She produced a copy of the demand letter which her lawyers sent to the Plaintiff on 29/7/1999 demanding that she removes the illegal structures she had put on the suit plot.

29. The Defendant relied on the case of **Sophie Wanjiku John v Jane Mwihaki Kimani** [2013] eKLR where the court found that the plaintiff's rights were protected under Sections 24 and 26 of the Land Registration Act since she had a title which was not fraudulently obtained. The court notes that Mary Muthoni Ndegwa does not have a title over plot number 144, her evidence in court was that she had commenced the process of obtaining titles over plot number 143 and the suit plot.

30. Section 26 of the Land Registration Act protects a registered proprietor whose certificate of title is to be taken by the courts as *prima facie* evidence that the registered proprietor is the absolute and indefeasible owner. The protection excludes titles acquired through fraud or misrepresentation which the registered proprietor is proved to have been party to as well as certificates acquired illegally, unprocedurally or through a corrupt scheme.

31. This is a case of double allocation. The Defendant allocated the same plot to two different persons. The issue for determination is which of the two claims by the Plaintiff and Mary Muthoni Ndegwa is superior to the other.

32. The Plaintiff was a member of the Defendant Company. She produced a copy of share certificate number 576 which the Defendant issued to her for 42 shares. It is dated 5/6/1983. It was her evidence that the Defendant reviewed its policy in 1976 to have 21 shares valued at Kshs. 2,100 per plot. The share certificate for 42 shares therefore confirms that the Plaintiff paid for two plots and not one as the Defendant contends.

33. The court notes that the Plaintiff made payments to the Defendant on diverse dates between 1973 and 1996 some of which are captured in the table above. The Defendant was reasonably expected to take into account all the payments which the Plaintiff had made from 1972 in arriving at its resolution in 1983. The court finds the Plaintiff's evidence believable based on the fact that she also paid the Defendant for a plot in Embakasi as noted above. The Defendant did not allocate the Plaintiff the plot in Embakasi.

34. The back of the receipts the Defendant issued to the Plaintiff is endorsed C 216 & 576 with the dates 3/8/80 and 5/6/83 on the back. The Defendant did not call any evidence to rebut the evidence tendered by the Plaintiff that she purchased the two plots. The Plaintiff produced many letters from various government agencies from which she had sought assistance in getting the Defendant to allocate her the two plots she paid for. The letters confirm that the Defendant adamantly refused to participate in the meetings called to resolve the issue.

35. Mary Muthoni Ndegwa did not produce any evidence of the share certificate the Defendant issued to Christopher K. Saina to confirm that he was a member of the Defendant company and that he was allocated plot numbers 143 and 144 by the Defendant which he sold. No evidence was adduced on how the said Christopher K. Saina acquired plot number 144 from the Defendant. She relied on the evidence of the processing of her title and correspondence on this issue.

36. Mary Muthoni Ndegwa claimed that the Defendant Company allowed the Plaintiff to purchase only one plot when she could not pay for two plots. No evidence of the Defendant's resolution which required each member to pay Kshs. 3,500 per plot in order to be allocated a plot at Githurai, Thika Road was produced in court. No evidence of the Defendant's decision to allow the Plaintiff to pay for plot number 145 only was produced in court.

37. The Plaintiff testified that the Secretary of the Defendant company destroyed some of her documents in 1983 after she had finished paying for the two plots. The evidence tendered by both the Plaintiff and Mary Muthoni Ndegwa confirms that the Plaintiff was in occupation of plot number 144 until the said Mary Muthoni Ndegwa gave her notice and demanded that she vacates the said plot.

38. The Plaintiff claims to have received threats to her life as a result of this land dispute from the Defendant. She claims her house was set ablaze while she was inside and that she was strangled by thugs while living on the suit land which she believes was caused by the land dispute.

39. The court finds that the Plaintiff has proved on a balance of probabilities that she bought two plots from the Defendant being plot numbers 144 and 145 situated in Githurai. She paid survey fees for the two plots in 1982 and 1983 and was in occupation until she was attacked and forced to flee from the suit land.

40. The court grants prayer (a) of the Plaint dated 27/10/2015. The Defendant or any person claiming under them is restrained from further harassing the Plaintiff on plot number 144. The Plaintiff, a senior citizen of 93 years acted in person in these proceedings and drafted the pleadings. Article 159 of the Constitution enjoins the court to administer justice without paying undue regard to technicalities.

41. The Defendant is hereby directed to execute the transfer documents that will facilitate the registration of the Plaintiff as the proprietor of plot numbers Nairobi Block 124/144 and 145 within 21 days of this judgement failing which the Deputy Registrar of the Environment and Land Court at Milimani will execute the documents.

42. The Plaintiff will have the costs of this suit to be borne by the Defendant.

Dated and delivered at Nairobi this 14<sup>th</sup> day of November 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Njeri Kiriba- the Plaintiff acting in person

Mr. Gitau for the Defendant

Mr. V. Owuor- Court Assistant