



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 239 OF 2012**

**ROBERT NGARUIYA CHUTHA.....PLAINTIFF**

**VERSUS**

**JOSEPH CHEGE NDUNG’U.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff commenced these proceedings vide a plaint dated **7/5/2012** which was filed on the same day. In the plaint the plaintiff prayed for a permanent injunction against the defendant or his agents to restrain them from entering, trespassing, erecting structures on and interfering with the plaintiff’s possession, occupation and legal ownership of the parcel of land known as **Ruiru West Block 1/673**.

2. The plaintiff also sought an eviction order to remove the defendant and his family members and illegal structures from the plaintiff’s said parcel of land after 30 days from the date of judgement; an order that the OCS Ruiru Police Station do supervise the enforcement of the orders and general damages for trespass, costs and interest.

**THE PLAINTIFF’S CASE**

3. The plaintiff’s case is that he bought the parcel of land known as **Ruiru West Block 1/673** measuring **0.0511 Ha** from the original shareholders through **Githunguri Constituency Ranching Company Limited** in **1993**; he was issued with the original Ballot Paper, Plot Share Certificate and Clearance Letter; he lodged these documents at the Kiambu Land Registry and he was directed to Ardhi House where on various dates he paid different types of fees. He took possession of the plot immediately in **1993** and he has been in occupation of the plot for **19** years; his Lease was registered on **31/20/2011**; a Certificate of Lease was issued in his name on **12/1/2012** at the Thika District Land Registry.

4. The plaintiff further avers that the defendant has unlawfully illegally entered or trespassed onto the suit land and interfered with the plaintiff’s quiet possession of the same; that the defendant has erected unauthorized structures using a fake share certificate and falsely claimed ownership of the land and that the documents that the defendant possesses and which form the basis the defendant’s his claim to ownership of the suit land were obtained long after the plaintiff bought the suit land.

**THE DEFENDANT’S DEFENCE**

5. The defendant filed a defence on **22/5/2012**. In the defence the defendant denies the plaintiff’s claim entirely and pleads a counterclaim against the plaintiff. In the counterclaim, the defendant avers that on **14/3/2008**, he purchased for value Land Parcel No. **Ruiru West Block 1/673** then being **Ballot No. 673** vide members’ Share Certificate **No. 2421** from **Telesia Wambui Gitahi** (also referred to as **Teresia**) for a sum of **Kshs.120,000/=**; the defendant took possession thereof immediately by putting up a two

bedroomed house of corrugated iron sheets and other developments which are still on land; The defendant therefore claims he is the rightful owner of **Plot No. Ruiru West Block 1/673** and prays for a cancellation of the plaintiff's title issued over the suit land and an order that he be registered as the proprietor thereof. He also seeks general damages against the plaintiff.

### **THE ISSUES FOR DETERMINATION**

6. In this court's view, the issues arising for determination in this matter are as follows:-

**(1) Who was the rightful share holder that was entitled to the suit land by virtue of his or her shareholding in Githunguri Constituency Ranching Co. Ltd?**

**(2) Who did the rightful shareholder transfer the land or share to – the plaintiff or the defendant?**

**(3) Was the plaintiff properly registered as the lessee over the suit land?**

**(4) What orders should issue in the plaint and the counterclaim?**

**(1) Who was the rightful share holder that was entitled to the suit land by virtue of his or her shareholding in Githunguri Constituency Ranching Co. Ltd?**

7. The plaintiff does not reveal in his plaint who sold the original shares to him. This is how he pleads at paragraph 3 of his plaint dated **7<sup>th</sup> May 2012**:-

***“The plaintiff avers that he bought the parcel of land known as Title No. Ruiru West Block 1/673 measuring 0.0511 Ha located at Ruiru along Eastern By-pass from the original shareholders through Githunguri Constituency Ranching Co. Ltd Offices in 1993....”***

8. Nowhere in the rest of the plaint are any names of the alleged original shareholders mentioned. There is no mention of their names in the plaintiff's witness statements dated **7/5/2012** either. The plaintiff says the plot is located along the Northern Bypass in his statement while in the plaint he states that it is along the Eastern Bypass. This is the witness statement which the plaintiff adopted in his sworn evidence at the hearing. In his evidence the plaintiff never named the original shareholders or owners who sold their share to him. He never stated that he met them. He stated under cross-examination that he paid the purchase price through one **Boniface Njuguna Kimani** who took the money and later brought him the receipt of **Kshs.33,000/=**, after which he collected his certificate from the company. Boniface, the plaintiff stated, was at that time a volunteer clerk with the company. It is noteworthy that the company is not enjoined in these proceedings for reasons known only to the plaintiff.

9. On the other hand the defendant's counterclaim states that the defendant purchased the land from one Telesia (Teresia) Wambui Gitahi who was the bona fide allottee of the share and from whose title he claims his title to the land derives and who happens to be his aunt, for a sum of **Kshs.120,000/=**. He testified at the suit that the said Telesia (or Teresia) Wambui (now deceased) gave him the property to use and also gave him the original share certificate a copy of which he produced in court. It is at **page 20** of the defendant's bundle of documents filed on **17/5/2017**. He avers that when he paid for the land, her aunt acknowledged receipt of the purchase price. This was supported by the document at **page 20** of the defendant's bundle of documents. The defendant then had the share transferred to his name at Githunguri Ranching Co. Ltd. He produced a copy of the share certificate which was issued in his name by the company. On that certificate is an indication handwritten at the top to the effect that it is a transfer of another Certificate No. **B1676**. It is dated **14/9/2010**. The agreement for sale dated **22/6/2010** is between Wambui Gitahi and Ngurish Investments Ltd, in respect of all that parcel of land represented by Ballot No. **2811** Certificate No. **2421** in Githunguri Constituency Ranching Co. Ltd. A copy of share certificate No. **1676** dated **22/6/2010** is produced at **page 22** of the defendant's bundle. Another sale agreement is produced at **page 21** of the defendant's bundle. It shows Teresia Wambui Gitahi sold his plot certificate No. **2421** Ballot (No. **6743**) to Joseph Chege Ndungu on **14/3/2008** in the presence of 3 witnesses for the

consideration of **Kshs.120,000/=**. The copy of share certificate No. **2421** dated **19<sup>th</sup> October, 1972** in the name of Telesia Wambui was produced at **page 20** of the defendant's bundle.

10. All the Share Certificates in the name of Wambui Gitahi and Telesia Wambui bear the same postal address. The Identity Card Number appearing on the agreement dated **14/3/2008** is the same as that on the share certificate No. **B.1676**. I conclude that Wambui Gitahi and Telesia Wambui Gitahi are one and the same person, variously referred to by different names over the years in the records relating to the suit land.

11. There is a letter (undated) showing the defendant had applied for electricity supply from Kenya Power & Lighting Co. Ltd on **22/10/2010**. I have also read the statement of Teresia Wambui Gitahi dated **2/3/2012** made prior to her demise to the police while investigations regarding the suit property were underway. It bears the same Identity Card Number as the one used in the records held by the defendant that is, **3368430**. She states that her Share Certificate Number was **2421** and her ballot number was **673**. She transferred the plot to the defendant herein. She avers that she had never sold the plot to any other person save the defendant. She averred that Chege had even settled on the plot.

12. In his statement to the police recorded in **March, 2012**, the plaintiff averred that **Boniface Njuguna** was the secretary to the Githunguri Constituency Ranching Co. Ltd. He stated that Njuguna introduced him to one parcel of land that was on sale; that the land was the suit land herein; that the price of the land then was **Kshs. 35,000/=** and that he paid Njuguna and Njuguna gave him the certificate and the ballot whose number the plaintiff cannot remember. These are the documents he used to process the lease and certificate of lease to the suit land. He says he began the transaction in **1992** and presented the documents to the Land Registry for processing in the year 1992. It appears that during all this time, he never knew the physical location of the suit land. In the year **2012**, after he was issued with a certificate of lease, he got a surveyor to show him the plot whereupon he found that the same was already occupied by the defendant.

13. In his statement, the plaintiff confesses that when he bought the plot, he dealt with Njuguna alone and he never met the "exact and real owner".

14. On his part, Boniface Njuguna Kimani contradicts the plaintiff. Since he never testified at the hearing, the court only got to know of his version from the statement he recorded with the police in investigations regarding the suitland. He avers that he was retired teacher co-opted into the Githunguri Constituency Ranching Co. Ltd. He denied being in office full time and said that when the plaintiff approached him for help, he approached a director called **Josephine Njeri Muthama** who asked to be left with the money produced by the plaintiff to purchase a plot from whoever would sell. After a few days the said Josephine informed Njuguna that she had already purchased a plot for Ngaruiya and Ngaruiya should come to the office in the year **1989** to pay the transfer fee which he did. His name was then included in the list of shareholders to be given leases and the list was forwarded to Kiambu Lands Office where the owners followed up the matter individually.

15. The plaintiff's statement in the plaint that he purchased the land from the original shareholders is therefore not supported by an iota of evidence. He merely dealt with a temporary worker in the company and got some company documents. He has never met the original owner of the land he bought to date. He is not capable of identifying such owner. He has not brought any such alleged owner to this court to give evidence. This raises doubt as to the genuineness of his transaction. I therefore find that the original rightful owner of a share who was entitled to the suit land by virtue of his or her shareholding in Githunguri Constituency Ranching Co. Ltd was Telesia Wambui Gitahi also referred to as Teresia or Telesia Wambui or Wambui Gitahi in the documents produced in evidence.

***(2) Who did the rightful shareholder transfer his land or share to – the plaintiff or the defendant?***

16. The defendant has produced an agreement dated **14/3/2008** showing that one Teresia Wambui Gitahi sold him the suit land for **Kshs.120,000/=**. The agreement is witnessed by persons who the defendant refers to as family members. The defendant has also produced copies of the original Share Certificate No.

**2421** dated **19/10/1972** in the name of Telesia Wambui as well as Certificate No. **B1676** in the name of Wambui Gitahi dated **22/6/2010**. He has also produced copies of receipts Nos. **11998** dated **25/2/1985**, in respect of Certificate No. **2421** and No. **Y800821** dated **4/4/1983** for survey fees in respect of Certificate No. **2421**. He also produced another receipt No. **Y800869** dated **4/7/1983** for Kshs.800/= in respect of Share Certificate No. **2421**. Receipt **No. 724** dated **11/2/1991** in the name of Telesia Wambui for Kshs.750/= being survey fees was produced. It is in the name of Wambui Gitahi. The defendant has also produced Certificate No. **B2001** dated **14/9/2010**. It is in his name. At the top of that certificate it has a handwritten indication that it was issued subsequent to transfer of Certificate No. **B1676** dated **22/6/2010**.

17. The plaintiff has not sufficiently explained why he does not have documents from the original owners of the plot he allegedly bought. I therefore find that he did not buy the land from the original owner or any person genuinely acting on his or her behalf.

18. I also find that the defendant was the rightful transferee of the share owned by Telesia Wambui Gitahi.

**(3) Was the plaintiff properly registered as the lessee over the suit land?**

19. The plaintiff admitted that he never dealt with the original owner of the suit land. He does not even have the documents. The original owner of the land made a statement to the police denying that she had ever sold the suit land to any other person save the defendant. The path the plaintiff followed in acquiring the plot was not proper. He should have sought the original owners of the land and dealt directly with them and the company. He did not instead, he employed the services of a person who was not even a permanent employee of the company, who alleges that it was another person, a director who bought the suit land on behalf of the plaintiff from the original owners. The plaintiff's agent, Boniface Njuguna Kimani and the director were not called to give evidence on behalf of the plaintiff. No other person from the company was called to give evidence for the plaintiff. However, through the help of these two persons, the plaintiff was able to get himself listed as one of the persons entitled to a lease. The plaintiff did not even know where the suit land was. He came to know of it later after obtaining the Lease whereupon he found the defendant in possession thereof. In my view, the plaintiff's desire to own land rendered him subject to manipulation and deceit by the very people he relied on. However, though desire to own land is not in itself wrong, the recklessness with which the plaintiff approached the transaction involving land in a company with members who purchased their shares decades ago leaves a lot to be desired.

20. I find that the registration of the plaintiff as the lessee over the suit land was not proper. The presentation of the documents to the Land Registry for processing of a lease to the plaintiff may seem an innocent act. However, the obtainance of those documents was fraudulent in that the original owner of the plot was not involved, and she remained with her original documents.

21. The plaintiff has contended that he never knew where the land was till after he obtained the lease. If he had sought to know where the land he was buying was, he would have hesitated to process the lease and enquired from the company, or from whoever sold him some documents, as to whether the defendant's documents were genuine.

22. The sudden appearance of the plaintiff on the scene in the year **2012** to claim the land is suspect. There is not a good reason given as to why the plaintiff did not follow up on his entitlement from **1992** to **2012**.

23. Due diligence was a necessity especially in view of the fact that the company which he was seeking land from was established decades before his attempts to obtain land. In the circumstances, he knew, or ought to have realized that not being an old subscriber, he had to deal personally with the owners of the share or the land he wished to purchase. It is also implausible that the plaintiff, who appears to this court to be a well-informed gentleman, would buy land whose location he did not know and, worse, through third parties who were not the owners thereof. It is most probable that he knew of the illegality of the transaction and heshut his eyes to it and nevertheless went ahead with it.

24. The plaintiff, not having quested sufficiently to know the genuine owners of the suit land became a beneficiary of the said fraud. I find that he cannot be regarded as an innocent purchaser for value without notice for the reason that he never conducted due diligence. He played a role in the fraud.

25. The documents obtained by the plaintiff should not have been issued to him. They should not have been used in the procurement of a lease in the name of the plaintiff. They were incapable of giving rise to a genuine lease. I therefore find that the lease and the certificate of lease obtained by the plaintiff using those documents have been fraudulently obtained and the lease and certificate of lease are for that reason illegal.

**(4) What orders should issue in the plaint and the counterclaim?**

26. In view of the findings of this court as above, the plaintiff's prayers for an injunction against the defendant and an eviction order and damages cannot issue as they are not merited.

27. On the other hand the defendant has proved that the Share Certificate was transferred to his name and the land was sold to him by the original owner of the land and that he has been in possession of the land for a long time. The registration of the plaintiff therefore never conferred any proper legal title over the suit land to him. Unless a transferor has proper title, a transferee cannot acquire clean title from the transferor. In the plaintiff's case, the transferor is unknown.

28. I therefore find that the defendant has proved his counterclaim on a balance of probabilities, while the plaintiff has failed to prove his claim. The plaintiff's suit is dismissed. I enter judgement for the defendant as against the plaintiff in the counterclaim. Consequently, I issue the following orders:-

***(1) A declaration that the defendant is the rightful owner of Land Parcel No. Ruiru West Block 1/673.***

***(2) That the registration of the plaintiff as lessee in respect of LR. No. Ruiru West Block 1/673 is illegal and incapable of granting him any rights over the suit land.***

***(3) That the illegally obtained title to Land Parcel No. Ruiru West Block 1/673 issued in the name of the plaintiff is hereby declared null and is consequently cancelled for having been fraudulently obtained.***

***(4) That the defendant be registered as the lessee over that land parcel known as LR. Ruiru West Block 1/673.***

***(5) That the plaintiff shall bear the costs of these proceedings.***

**Signed at Kitale on this 4<sup>th</sup> day of October, 2017**

**MWANGI NJOROGE**

**JUDGE**

**Dated, signed and delivered at Nairobi on this 10<sup>th</sup>**

**day of November, 2017**

**K. BOR**

**JUDGE**

**Judgement read in open court at Nairobi on this 10<sup>th</sup> day of November, 2017**

**In the presence of:**

**No appearance for the Plaintiff.**

**Obuya for Ongicho for the Defendant.**

**Court Assistant: V. Owuor**

**K. BOR**

**JUDGE**